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THE LAW

RELATING TO

FRAUDULENT CONVEYANCES,

UNDER THE

STATUTES OF ELIZABETH, THE BANKRUPTCY ACTS,
AND THE VOLUNTARY CONVEYANCES ACT.

BY

ARTHUR JOSEPH HUNT,
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Second Edition.

BY

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PREFACE TO SECOND EDITION.

IF any excuse be needed for a new Edition of this Work, it may be found in the fact that it is now nearly twenty-five years since the First Edition was published, and during that period, legislation, and our Courts of Justice, have not stood still: several important Acts of Parliament have been passed which have modified or extended the Statute Law relating to the subject matter, and more numerous important Cases have been decided.

Amongst the Statutes it is only necessary to refer to the Married Women's Property Act, 1882; the Bankruptcy Act, 1883; and the Voluntary Conveyances Act, 1893.

In the production of this Edition, I have adopted the plan and arrangement originally followed by the learned Author, and, where possible, I have retained the original text. Readers are warned to remember that the old Cases, decided under 27 Eliz. c. 4, must now be considered, by the light of the Voluntary Conveyances Act, 1893, before they can be regarded as authorities at the present day.

It has been found necessary, in order to keep the Work within reasonable bounds, to excise the Chapter on "Bills of Sale."

The Index to the present Edition has been considerably enlarged, a Table of Cases containing the references to the contemporaneous reports has been added, and it is hoped that the profession will find that the Second Edition is as worthy of support as its predecessor.

In conclusion, I have to thank my friend, Mr. ARTHUR UNDERHILL, M.A., LL.D., for the kind use he has allowed me to make of his work on "Trusts and Trustees."

W. C. P.

5, NEW SQUARE,
LINCOLN'S INN, W.C.,
March, 1897.

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THE LAW

RELATING TO

FRAUDULENT CONVEYANCES.

CHAPTER I.

Concerning the Statute 13 *Eliz. c.* 5, *and the earlier Statutes* in pari materiâ.

It is proposed in the following pages to treat of the subject of fraudulent conveyances, and to consider how far they can be supported against creditors and subsequent purchasers.

The principal statute which relates to fraudulent conveyances and assignments, made with the view of defrauding creditors, is the statute 13 Eliz. c. 5 ; and there are sundry provisions in the Bankruptcy Acts relating to the same subject. It is intended in the first place to consider the statute 13 Eliz. c. 5, and then shortly to refer to the clauses in the Bankruptcy Acts, which make an assignment by a debtor of his property an act of bankruptcy, and void against the trustee in bankruptcy. The statute 27 Eliz. c. 4, which was made to prevent frauds upon purchasers, will then be considered. Many cases, however, relating to the last-

mentioned statute will be cited while treating of the statute 13 Eliz. c. 5. This could not be prevented, because, the two statutes being *in pari materiâ* and having many points in common, it was absolutely necessary at times to consider them both together.

Before noticing the statute 13 Eliz. c. 5, it may be well to refer to the earlier statutes which were passed with the view of preventing frauds upon creditors. The first of these statutes is the statute 50 Edw. 3, c. 6, whereby, after reciting that because that divers people inherit of divers tenements, borrowing divers goods in money or in merchandise of divers people of this realm, do give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of Westminster, of St. Martin le Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant, it is ordained and assented that if it be found that such gifts be so made by collusion, then the said creditors shall have execution of the said tenements and chattels, as if no such gift had been made. This Act was followed by two others, 2 Rich. 2, st. 2, c. 3, and 3 Hen. 7, c. 4, which enacted similar provisions.(*a*) These statutes were repealed by the Statute Law Revision Act, 1863.

The statute 13 Eliz. c. 5 (entitled "An Act against fraudulent deeds, giftes, alienations," &c.), was passed

(*a*) And see the statutes 13 Eliz. c. 10, and 18 Eliz. c. 11, as to fraudulent assignments by ecclesiastics in order to defeat their successors of their actions for dilapidations.

"for the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

By section 1(*b*) it is DECLARED, ordained, and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, at any time had or made since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (ONLY as against that person or

(*b*) In the numbering of the sections "Chitty's Collection of the Statutes" has been followed. See the note there.

persons, his or their heirs, successors, executors, administrators, and assigns and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding.

A few short notes are here appended to some of the sections of the statute under consideration to facilitate reference to other parts of the work, where the principal points which commonly arise under the Act are dealt with at large.

It will be observed that this statute refers to chattels and personalty as well as to real estate, which is not the case with the other statute, 27 Eliz. c. 4, which refers only to land; also that the statute, 13 Eliz. c. 5, was passed for the protection of creditors, while the statute 27 Eliz. c. 4 was passed to protect purchasers.

Neither of the two statutes of Elizabeth which are treated of in this work speak of VOLUNTARY conveyances and assignments, but only of those which are fraudulent, and made to deceive creditors, purchasers and others. A conveyance or assignment cannot, therefore, be avoided under these statutes merely because it is voluntary. If it does not interfere with the right of a creditor or of a subsequent purchaser for valuable consideration, it will remain as effectual and binding on the grantor or assignor, as if the property comprised in

the voluntary instrument had changed hands upon a sale.(*a*)

It will further be noticed that the statute 13 Eliz. c. 5, applies not only to creditors, but also to *other parties* whose actions and suits are delayed by the fraudulent conveyance. Consequently the lord of a manor may avoid an assignment made by a tenant of the manor in order to defeat the lord of his heriot, and an assurance made to delay process at the suit of the Crown will be set aside.(*b*)

The word "declared" is used in the first section of the statute 13 Eliz. c. 5. The Act is consequently said by Lord COKE to be only confirmatory of the common law, which abhors all manner of fraud. Indeed, Lord MANSFIELD said that the rules of law were so strong against fraud that the common law itself would have attained every end which is proposed by the statutes of fraudulent conveyances. A statement which, however true with respect to the statute 13 Eliz. c. 5, is hardly warranted in the case of the other statute (27 Eliz. c. 4) under which all voluntary assurances used to be treated as fraudulent in law against subsequent purchasers, although they bought with full notice of the voluntary instrument.(*c*) Now by the Voluntary Conveyances Act, 1893,(*d*) a voluntary settlement or conveyance is not to be deemed fraudulent and avoided under 27 Eliz. c. 4, by reason of a subsequent purchase for value.

By section 2,(*e*) all and every the parties to such

(*a*) *Infra*, Chapter XV. (*b*) *Infra*, Chapter XIII.

(*c*) *Infra*, Chapter XVIII.

(*d*) 56 & 57 Vict. c. 21. See also Chapter XIX, *post*.

(*e*) This section is considered with the corresponding section in the other statute in Chapter XXIV.

feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same or any of them, which at any time after the 10th day of June next coming shall wittingly and willingly put in ure, avow, maintain, and justify, or defend the same, or any of them, as true, simple and done, had or made *bonâ fide* and upon good consideration ; or shall aliene or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same, and the whole value of the said goods and chattels, and also so much money as are or shall be contained in any such covinous and feigned bond ; the one moiety whereof to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any one of the Queen's courts of record by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law shall be admitted for the defendant or defendants ; and also being thereof lawfully convicted, shall suffer imprisonment for one half-year without bail or mainprize.

By section 3 it is provided and further enacted, that whereas sundry common recoveries of lands, tenements, and hereditaments have heretofore been had and hereafter may be had against tenant in tail, or other tenant

of the freehold, the reversion or remainder, or the right of reversion or remainder, then being in any other person or persons ; that every such common recovery heretofore had and hereafter to be had of any lands, tenements, or hereditaments shall as touching such person and persons which then had any remainder or reversion, or right of remainder or reversion, and against the heirs of every of them, stand, remain, and be of such like force and effect and of none other as the same should have been if this Act had never been had nor made.

"The words of this section, when examined, clearly show that it applies only to persons who are not parties to the recovery, but have estates in remainder or reversion subsequent to and expectant on the estates of those who are parties to the recovery The meaning of the clause evidently is, that, although the uses of a fraudulent recovery shall not prevail to defraud creditors, yet that the recovery shall stand good to bar those in remainder or reversion as if there had been no fraud."(*a*)

By section 4 it is provided and further enacted, that this Act or anything therein contained shall not extend to make void any estate or conveyance, by reason whereof any person or persons shall use any voucher in any writ of formedon, now depending or hereafter to be depending, but that all and every such vouchers in any writ of formedon shall stand and be in like force and effect as if this Act had never been had nor made ; anything before in this Act contained to the contrary notwithstanding.

By section 5 it is provided, that this Act or anything

(*a*) Per Lord CAMPBELL, in *Tarleton* v. *Liddell*, 17 Q. B. 390.

herein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon GOOD CONSIDERATION AND BONA FIDE lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

To bring a conveyance or assignment within this section it must be both *bonâ fide* AND founded on good consideration. Therefore, a transaction which is dishonest and a mere colourable affair got up to delay creditors will not be supported, although some consideration may have passed to the debtor when the property was transferred. And by good consideration is here meant valuable consideration, such as money or marriage. A mere voluntary settlement is of no avail against the claims of creditors, although executed for the purpose of making provision for a wife or child. If this section is complied with, a purchaser of any interest under the deed impeached, whether that interest be legal or equitable, will be protected, and the deed is not void against him.(*a*)

By section 6 the Act is made to endure to the end of the first session of the next Parliament.

By 29 Eliz. c. 5, the Act is made perpetual, it having previously been confirmed by 14 Eliz. c. 11, s. 1.

(*a*) *Halifax Joint Stock Banking Company* v. *Gledhill* [1891], 1 Ch. 31.

The Irish Act, which corresponds with 13 Eliz. c. 5, is the statute 10 Car. 1, c. 3, sess. 2, ss. 10—15.

Having made these few preliminary remarks, the first subject which will be noticed will be the extent to which the consideration of marriage will support a settlement against the claims of creditors and subsequent purchasers.

CHAPTER II.

The Extent of the Marriage Consideration.

SECT. 1.—*Ante-nuptial Settlements.*

MARRIAGE has been described as "the most valuable consideration known to the law," and will support an ante-nuptial settlement against the claims of the settlor's creditors and against subsequent purchasers.(*a*) Post-nuptial settlements executed in pursuance of ante-nuptial articles stand on the same footing as ante-nuptial settlements, and are dealt with in Chapter III. The present chapter will be devoted to the consideration of settlements executed before marriage.

An ante-nuptial settlement will be equally available against the creditors of and subsequent purchasers from the person bringing the property into settlement, whether that person was the husband or the wife, or some third party who has placed himself *in loco parentis* to them. Thus, it is said in *O'Gorman* v. *Comyn*,(*b*) "If on a marriage and in consideration of that marriage an estate is limited to the husband in fee by other persons who are of the family, and, therefore, may be considered as making provision for the persons

(*a*) *Townshend* v. *Windham*, 2 Ves. 1; *Ford* v. *Stuart*, 15 Beav. 499; *Fraser* v. *Thompson*, 4 De G. & J. 659; *Kirk* v. *Clark*, Pr. Ch. 275; *Colville* v. *Parker*, Cro. Jac. 158; *Douglasse* v. *Waad*, 1 Ch. Ca. 99; *Brown* v. *Jones*, 1 Atk. 188; *Wheeler* v. *Caryl*, Amb. 121; but the marriage must have been a valid one. See *Chapman* v. *Bradley*, 33 Beav. 61; *Coulson* v. *Allison*, 2 Giff. 279; affirmed 3 L. T. (N.S.) 763.

(*b*) 2 Sch. & Lef. 147; see *Power* v. *Bailey*, 1 Ball & B. 49.

claiming under the settlement, the husband may set up a claim as a purchaser for valuable consideration, not with a view to his own enjoyment simply, but because his enjoyment of the estate is part of the inducement to the marriage itself. For instance, if a father, in consideration of the marriage of his son, were to convey an estate in fee to his son, the son would be a purchaser for valuable consideration, though no consideration had passed to the father but the marriage. All provisions made for the husband as well as for the wife and issue by a marriage settlement are to be taken as for valuable consideration."

An ante-nuptial settlement made by a husband on his wife and family will be supported against his creditors, although he was greatly indebted and even insolvent at the time it was executed, if it can be shown that the wife was no party to a scheme to defraud the creditors of her husband. When a settlement contained a recital to the effect that the intended husband was indebted to the intended wife in the sum of 20,000*l.*, and the intended husband covenanted to pay the 20,000*l.* to the trustees of the settlement upon trust that as soon as he should become owner of an estate which he had agreed to purchase the trustees should advance the 20,000*l.* to him on the security of the said estate, and it was declared that the trustees should stand possessed of the 20,000*l.*, and the securities representing the same upon trust to pay the income to the intended wife for life for her separate use, then to the husband for life or until bankruptcy, with remainder to the children of the marriage, and in default of children, to the wife absolutely. The recital of the debt was, in fact, false, and the husband was, in fact, insolvent, but the wife was an innocent

party. It was held that, notwithstanding the false recital, the settlement and mortgage were valid against the creditors of the husband so far as concerned the interests of the wife and children.(*a*) She would probably be deemed guilty of participation in the fraud if the settlement was grossly out of proportion to the station and circumstances of the husband, or if it contained on the face of it something so extravagant that it ought to have led to inquiry.(*b*) In *Campion* v. *Cotton*,(*c*) the husband was in pecuniary difficulties at the time of the settlement, and his embarrassment was well known to the wife. The property settled consisted of stock, plate, furniture, jewels, &c., together with some real estate. There was a false recital that this property had been purchased with money belonging to the wife. After the death of the settlor, an attempt was made by his creditors to set aside this settlement as being in fraud of their rights, but it was upheld by the Master of the Rolls. He said, "It is clear that, supposing the whole to have been the property of the husband, he might have settled it upon his marriage. According to the cases decided at law, even the movable effects might be so settled; and neither the joint possession which he had of the furniture, nor the want of an inventory, would invalidate the settlement. It is clear also that the fact of his being indebted at the time, and of her knowing him to be so, would not affect its validity. . . . The utmost the creditors can make of the falsehood in the deed is, that the property was in truth the husband's,

(*a*) *Kevan* v. *Crawford*, 6 Ch. D. 29.

(*b*) *Ex parte M'Burnie*, 1 D. G. M. & G. 441. See pp. 446-7.

(*c*) 17 Ves. 264; but see *Kevan* v. *Crawford*, 6 Ch. D. 29, as to false recitals.

though it was asserted to be the wife's; but if he could settle this property, and has done what bound him to give a title to it, supposing it to be his, how are they advanced by establishing that fact? All she could necessarily collect from seeing it asserted in the preceding declarations of trust that the real estate had been purchased with her money, contrary to that fact, was, that he chose to take that mode of giving her those estates. I do not think it can be inferred from the evidence that she knew he was in such circumstances as to make his bounty to her a fraud upon any one."

An ante-nuptial settlement will be void under 13 Eliz. c. 5, if the marriage is entered into by the wife and the settlement is executed for the express purpose of defrauding her husband's creditors.(*d*)

Where the wife is privy to the fraud upon the creditors, the settlement is clearly void against them. Thus, in *Fraser* v. *Thompson*,(*e*) a man, who was a trader, had before the execution of his marriage settlement committed several acts of bankruptcy. The wife was well aware of this, and had secreted her intended husband from his creditors. Although the marriage was in fulfilment of a long engagement, the settlement was held to be void against the husband's assignees in bankruptcy, in consequence of the participation of the wife in the fraud. In *Columbine* v. *Penhall*,(*f*) a solicitor and

(*d*) See *Ex parte Pennington; Re Pennington*, 59 L. T. 774; affirmed on appeal, 5 T. L. R. 29; (1888) W. N. 205.

(*e*) 4 De G. & J. 559, overruling STUART, V.C., 1 Giff. 49.

(*f*) 1 Sm. & Giff. 228. And see *Penhall* v. *Elwin*, 1 Sm. & Giff. 258; *Ex parte Mayor*, Mont. 292; *Davies* v. *Thomas*, 2 Y. & C. Eq. Rep. 234; *Re Pennington*; *Ex parte Cooper*, 59 L. T. 774; (1888) W. N. 205.

money scrivener had cohabited with a woman for seven years. Being in insolvent circumstances, and intending to screen his property from his creditors, he married the woman, and by a settlement executed prior to the marriage, he conveyed and assigned the whole of his real and personal property to trustees upon certain trusts for his wife, with a joint power for himself and his wife to appoint amongst the children of the marriage (including an illegitimate daughter). With the exception of this power, he reserved no interest to himself in the property. The power was shortly afterwards exercised in favour of the illegitimate daughter. The property remained under the control of the husband, and within two months after the marriage a *fiat* in bankruptcy was issued against him. On a bill brought by the wife to establish the settlement, it was held that the transaction was a mere contrivance by the husband and wife to remove the husband's property from the reach of his creditors, and to enable them to enjoy it in the same manner as they did before the marriage; and that, as the husband was a trader within the bankrupt laws, the settlement was an act of bankruptcy, and void against the assignees. In *Bulmer* v. *Hunter*,(*a*) MALINS, V.C., pronounced against the validity of a settlement on the same grounds, saying that it was clearly his opinion that arrangements made on a marriage, which is got up by the settlor and his wife for the purpose of defrauding his creditors, could not be supported.

It is decided by the case of *Chubb* v. *Stretch*,(*b*) that property which is settled by a woman upon the mar-

(*a*) L. R. 8 Eq. 48.

(*b*) L. R. 9 Eq. 555. See *M'Henry* v. *Davies*, L. R. 10 Eq. 88.

riage to her separate use is liable after her husband's bankruptcy for debts contracted by her before her marriage. In his judgment, MALINS, V.C., observes: "The law as to the liability of a husband for the debt of the wife contracted before marriage proceeds upon this principle, that as by the common law the husband takes all the property of the wife, he is liable for her debts. But the husband and wife must be sued jointly for the wife's debt, and if no action is brought during the coverture and the wife survives, she remains just as liable for the debt as she was before the marriage; but if an action is brought and judgment recovered against husband and wife during the coverture, and if the husband becomes bankrupt, and obtains his discharge, I am bound to assume from the authorities, and especially Lord DENMAN'S judgment in *Lockwood* v. *Salter*,(*c*) and the *dictum* of Lord MACCLESFIELD in *Miles* v. *Williams*,(*d*) that the liability of the husband and of the wife for the wife's debt is gone at law. . . . But this suit is founded on the principle that though the wife is personally discharged at law, her property, so far as she takes a separate interest under the settlement, is not discharged from the liability to satisfy her debt. If it were the law that a woman may contract debts having the means to pay them, and then may marry and execute a settlement of her property, reserving it to her separate use, and that thereby her property is

(*c*) 5 B. & Ad. 303; but see now Married Women's Property Acts, 1870, s. 12; 1874, ss. 1, 2, and 5; and 1882, ss. 14 and 15.

(*d*) 1 P. Wms. 249, 257. See also *Biscoe* v. *Kennedy*, 1 Bro. C. C. 17 *n*; *Sparkes* v. *Bell*, 8 B. & C. 1, observed upon in *Lockwood* v. *Salter*, 5 Bar. & Ad. 303; *Bonner* v. *Bonner*, 17 Beav. 86; *Chubb* v. *Stretch*, L. R. 9 Eq. 555.

completely absolved from all liability for her debts, it would be very much to be deplored. In my opinion, every settlement which takes property out of the reach of the creditors of the settlor savours of fraud. Persons who make a settlement on marriage ought to make proper provision for the payment of their debts, and if they do not make such provision the court ought to regard the transaction as one which deserves disapprobation. This lady has made a settlement of all her property to her separate use during the joint lives of herself and her husband, and it would be most unjust and inequitable that she should deprive her creditors of the payment of their debts. Is she entitled to do so? There is no question that debts incurred by a married woman may be enforced against her separate estate. It is also perfectly clear that if a man by a marriage settlement reserves a life interest for himself in the settled property, that life interest is liable to his creditors. Why should not the same rule apply to a woman? I think that, upon every principle of justice, if a woman reserves a separate interest it should remain liable to her creditors."

By section 12 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), it is enacted, that a husband shall not by reason of any marriage taking place after the commencement of that Act be liable for the debts of his wife contracted before marriage, but that the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried.

The effect of the Married Women's Property Act Amendment Act, 1874 (37 & 38 Vict. c. 50), ss. 1, 2, and 5, which applied to every woman married on or

after July 30th, 1874, was that it created a liability of the husband to pay his wife's ante-nuptial debts, but this liability was limited to the amount of the assets which he had actually received or might have received through or in right of his wife. At the same time the wife still continued liable to the extent of her separate property as provided by the Act of 1870.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which applies to women married on or after 1st January, 1883, it is enacted by section 13 that, a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into and wrongs committed by her, before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and as between her and her husband unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong as aforesaid, except as to any separate property to which she may become

entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

By section 14 a husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment made have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid.

And by section 15, it is enacted that a husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them;

and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

And by section 2 of the same statute, the expression "separate property" includes all real and personal property which shall belong to a woman (married after the passing of this Act) at the time of marriage, or shall be acquired by or devolve upon her after marriage.(*a*)

The Married Women's Property Act, 1882, has, therefore, entirely altered the law as regards the liability of a husband for the ante-nuptial debts of his wife. First, he can now be sued without her, and whether she is alive or dead: see section 14, and the expression in section 15, "if in any action brought against the husband alone." Secondly, he can be sued with her under section 15, if the plaintiff seeks to establish his claim wholly or in part against both husband and wife; but in this case the judgments may be separate,

(*a*) *In re March; Mander* v. *Harris*, 24 Ch. D. 222.

although to the extent to which they are both liable, the judgment may be "a joint judgment against the husband personally, and against the wife as to her separate property." Thirdly, the husband's liability is no longer unlimited as at common law; it is limited to the value of his wife's property which he may have acquired: see section 14. Fourthly, as between him and her he is entitled to be indemnified out of her separate property: see section 13. It follows from the above that a judgment recovered against the wife is no defence to an action against the husband; on the other hand, any defence open to the wife, such as the Statute of Limitations, is also open to the husband.(*a*)

Marriage settlements frequently contain covenants that all property to which the wife or her husband in her right may become entitled during the coverture shall be assigned to the trustees upon the trusts of the settlement. Sometimes, too, it is covenanted that some portion of the husband's future acquired property shall be settled in the same manner.(*b*) As the effect of these agreements is to entrench upon the rights of creditors, a special clause was inserted in section 91 of the Bankrupt Act of 1869, and repeated with slight modifications by section 47 (2) of the Bankruptcy Act,

(*a*) *Beck* v. *Pierce*, 23 Q. B. D. 316.

(*b*) *White* v. *Anderson*, 1 Ir. Ch. Rep. 419; *Brashier* v. *Wyatt*, 16 L. T. (N.S.) 275; *Creed* v. *Carey*, 7 Ir. Ch. Rep. 295; *Lyster* v. *Burroughs*, 1 Dr. & Wal. 175; *Maclurcan* v. *Lane*, 5 Jur. (N.S.) 56; *Nayler* v. *Wetherell*, 4 Sim. 114; *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48. A covenant by a man to pay a sum of money out of property of which he shall die seised or possessed is confined to property which is strictly his at the time of his death, viz., that remaining after payment of his debts. *Rowen* v. *Chute*, 13 Ir. Ch. Rep. 169; *Garthshore* v. *Chalie*, 10 Ves. 1.

1883,(*c*) whereby it is provided that any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest,(*d*) whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in bankruptcy. It appears that this section does not affect a covenant for the future settlement of money, or property of or in right of the settlor's wife; nor the validity of a covenant for the future payment of any sum of money not specifically earmarked.(*e*) A covenant to settle a share of property to which the settlor is entitled as an object of a power of appointment not then executed is an "interest" in property and so can be settled.(*f*)

In *Ex parte Bolland; In re Clint*,(*g*) a trader executed a settlement upon his marriage of certain chattels for the benefit of his wife and children. The settlement also contained a covenant by the settlor with the trustees that all future real or personal estate which he should at any time during the coverture be possessed of, or entitled to, or should otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or

(*c*) See 46 & 47 Vict. c. 52.

(*d*) See *Re McCrohan*, 31 Ir. L. R. 225.

(*e*) *Ex parte Bishop; Re Tonnies*, L. R. 8 Ch. 718; *Ex parte Cooper; Re Knight*, 2 Morrell, 223.

(*f*) *In re Andrew's Trusts*, 7 Ch. D. 635.

(*g*) L. R. 17 Eq. 115.

otherwise howsoever, should be conveyed and assigned to the trustees upon the trusts thereby declared. The settlor afterwards bought some shares in a joint stock company. Three years afterwards he was adjudicated bankrupt. At the time the shares were then standing in his name, but the certificates were in the possession of his wife's father, and they were afterwards delivered to the trustees of the settlement. It was admitted that the settlor was solvent at the date of the settlement; but it was held by BACON, C.J., that the covenant was void as against the creditors and that the trustee in bankruptcy was entitled to the shares.

But see and consider *Hardy* v. *Green*.(*a*) It is believed that this case is distinguished from the case of *Ex parte Bolland* on the ground that the settlement in *Hardy* v. *Green* was not attacked as being fraudulent, if it had been so attacked it would not have been upheld.

It may be advantageous here to advert to an important difference which prevails between the rules of law and equity as to the conveyance of property of which the grantor has not the possession at the time of the transfer. At law a deed which purports to convey property, whether real or personal, which is not in existence is void, for the simple reason that there is nothing for the instrument to operate upon.(*b*) In equity an agreement to transfer property which is not in existence, though it cannot effect a present alienation, will nevertheless operate as a charge upon the property

(*a*) 12 Beav. 182; and see *Kevan* v. *Crawford*, 6 Ch. D. 29.

(*b*) *Holroyd* v. *Marshall*, 10 H. of L. 191, 210; *Per* Lord WESTBURY, L.C., *Deacon* v. *Smith*, 3 Atk. 323; "Chitty on Contracts" (7th edit.), 349.

as soon as it is acquired, and the transferor will thenceforth be a trustee for the transferee upon the terms of the agreement. This rule of equity, however, is not applicable where the agreement is not one of which the court would decree specific performance ;(*c*) nor where the contract amounts merely to a license to seize, and not to an equitable assignment of the after acquired property."(*d*)

It is impossible to set aside a marriage contract, after the marriage has taken place, on the ground that there has been a failure in the performance of some collateral act or thing which formed part of the agreement when the marriage was stipulated for. The reason is, as pointed out by Lord COTTENHAM in *Lloyd* v. *Lloyd*,(*e*) "that the parties to the contract are not the only persons having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage."(*f*) This rule, however, only applies to the parties to whom the consideration of marriage extends, and, therefore, where a husband has been disappointed of the portion he was to have received with the wife, he cannot be compelled to perform his part of the marriage agreement by collaterals, who are only volunteers and not within the marriage consideration.(*g*) And

(*c*) *Ibid.*

(*d*) *Reeves* v. *Whitmore*, 33 L. J. Ch. 63 ; *Hope* v. *Hayley*, 5 E. & B. 830 ; *Belding* v. *Read*, 3 H. & C. 955 ; and see *Carr* v. *Acraman*, 11 Exch. 566 ; *Chidell* v. *Galsworthy*, 6 C. B. (N.S.) 471.

(*e*) 2 My. & Cr. 192, 204.

(*f*) See also Lord HARDWICKE'S remarks in *Harvey* v. *Ashley*, 3 Atk. 607, 610; *Perkins* v. *Thornton*, Ambler, 502 ; *North* v. *Ansell*, 2 P. W. 618 ; *Campbell* v. *Ingilby*, 21 Beav. 567, 579 ; *Lang* v. *Lang*, 8 Sim. 451 ; *Jeston* v. *Key*, L. R. 6 Ch. 610.

(*g*) *Savill* v. *Savill*, 2 Coll. 721; *Campbell* v. *Ingilby*, 21 Beav. 567.

equity will not allow a person who has failed to perform his part of a marriage contract to enforce it, against those whom he has injured by his default,(*a*) and his creditors can stand in no better position ;(*b*) but the default of a husband or wife will not affect the children of the marriage, for whom the settlement will be specifically carried out.(*c*)

SECT. 2.—*To whom the Consideration of Marriage Extends.*

The consideration of marriage being the most valuable known to the law will support all the limitations contained in a marriage settlement in favour of the husband, wife, and children, who are consequently purchasers of their respective interests.(*d*) The collateral relations of husband and wife, or the children of a previous, or future, marriage, or the illegitimate issue of either party, however, are not within the marriage consideration, and, therefore, the settlement, so far as their interests are concerned, must be looked upon as voluntary,(*e*) unless it can be shown that the interests given to such

(*a*) *Crofton* v. *Ormsby*, 2 Sch. & Lef. 602 ; *Jeston* v. *Key*, 6 L. R. Ch. 610.

(*b*) *Priddy* v. *Rose*, 3 Meriv. 86 ; *Ex parte Mitford*, 3 Meriv. 105 ; *Houston* v. *Barry*, 5 Ir. Eq. Rep. 294.

(*c*) *Crofton* v. *Ormsby*, *supra*.

(*d*) *Nairn* v. *Prowse*, 6 Ves. 72 ; *Reeves* v. *Reeves*, 9 Mod. 132 ; *Hill* v. *Gomme*, 5 My. & Cr. 250. Where a power of appointment is given to the husband or wife by the settlement, persons taking under the power are within the marriage consideration. *Campbell* v. *Ingilby*, 21 Beav. 567, 580.

(*e*) *Mackie* v. *Herbertson*, 9 App. Cas. 303 ; *De Mestre* v. *West*, 91 A. C. 264 ; *Attorney-General* v. *Jacobs Smith* (1895), 2 Q. B. 341 ; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

collaterals are so mixed up with the interests of children or persons within the marriage consideration that it is impossible to exclude them without also voiding the interests of such children.(*e*)

Until recently it was always considered that the children of a widow who, on a second marriage, made or procures a settlement in their favour, could enforce performance of the covenant or incompleted trust on the ground that they were privy to the valuable consideration of the marriage.(*f*) The judges went so far in other cases as to extend the marriage consideration to all relatives of an intended wife, and even to the relatives of an intended husband where he was not the settlor, on the ground that a benefit to these relatives must have formed part of the marriage bargain.(*g*) The case of *Clarke* v. *Wright*(*g*) has, however, been expressly overruled by the Privy Council in *De Mestre* v. *West*,(*h*) and it is submitted that the same case by implication overrules *Gale* v. *Gale*.(*e*) The most recent decision on the question is that of *Attorney-General* v. *Jacobs Smith*,(*i*) and as this case goes fully into the law on the subject and explains other cases, it has been deemed expedient to give a rather copious extract from the judgment.

KAY, L.J., there says(*k*) that the marriage consideration "covers *primâ facie* the husband and the wife, and

(*f*) *Gale* v. *Gale*, 6 Ch. D. 144.

(*g*) *Clarke* v. *Wright*, 6 H. & N. 849.

(*h*) 91 App. Cas. 264. See also *Mackie* v. *Herbertson*, 9 App. Cas. 303; *Re Cameron and Wells*, 37 Ch. D. 32; and *Attorney-General* v. *Jacobs Smith* (1895), 2 Q. B. 341.

(*i*) [1895], 2 Q. B. 341.

(*k*) [1895], 2 Q. B. 341, at p. 353.

the issue of that marriage and any limitation in favour of any of those persons comes within the marriage consideration. That is to say, they are all treated for every purpose of the settlement as though a consideration moved from each one of them. But it has often been decided that *primâ facie* persons to whom property is limited directly or by way of remainder in an antenuptial settlement other than the husband and wife and the issue of the marriage are not within the marriage consideration, and although the limitation to them is in a settlement which, as between the settlors, is made for the most valuable consideration imaginable, that of marriage, they, nevertheless, for some purposes, if not for all purposes, are to be treated as volunteers. Undoubtedly, *primâ facie*, that would apply to children of either of the settlors by a former marriage, and the course of the decisions shows that it would certainly apply to children of the husband by a former marriage. But it is said that there is an exception in the case of children of the wife, or intended wife, by a former marriage, and that if they are included in the settlement they were not volunteers. *Newstead* v. *Searles*.(*a*) Judges have remarked upon that as being a very extraordinary exception, and have doubted it and felt great difficulty in ascertaining the reason of it. But we now have an authoritative explanation of the decision in *Newstead* v. *Searles* by one of the greatest masters of equity who have ever lived in our time, if not in any time, the late Lord SELBORNE, who, after a careful consideration of all the authorities, came to the conclusion to which I am going to refer. In the first place, I observe that in *Newstead* v. *Searles*, we find that Lord HARDWICKE, in

(*a*) 1 Atk. 265.

dealing with the question whether the children of the lady in that case by a former marriage were persons in whose favour the settlement could be enforced or not, says this: 'The children of the first marriage' (he means the first marriage of the lady) 'stand in the very same plight and condition as the issue would have done if there had been any of the second marriage' (the marriage in contemplation of which the settlement was made), 'and even are provided for before them. Supposing there had been issue of the second marriage and they had brought their bill to carry these articles into execution, upon a decree in their favour, would not the children of the first marriage have been equally entitled to the benefit from the decree?' I do not lose sight of the fact that in the other part of his judgment he treats the children of the first marriage as not being volunteers, and uses language which would seem to imply that the settlement, even as far as they were concerned, could not be treated as a voluntary settlement, but he gives what I have just read, as one of the reasons for his decision. When that decision came to be considered in the House of Lords by Lord SELBORNE, in the case of *Mackie* v. *Herbertson*,(*b*) he says (p. 336): 'I do not think that I need make any further observations upon the case'—that is another case he had been referring to—'beyond this, that if any English authorities were fit to be regarded in a question of this kind as to what is and what is not within the consideration of the contract, the cases of *Newstead* v. *Searles*(*c*) and *Clayton* v. *Wilton*(*d*) would be very much to the

(*b*) 9 App. Cas. 303.
(*c*) 1 Atk. 265.
(*d*) 3 Madd. 302.

purpose. *Newstead* v. *Searles* was a case of this kind; there was a marriage contract and there was a gift in remainder to the existing children of a former marriage, subject to letting in those who might afterwards be born of the intended marriage; and when they came into existence the state of things would be such as we have here. Upon those circumstances, Lord HARDWICKE, a very great judge, entertained no doubt that the considerations of the contract included the earlier children, because their interests and those of the children of the marriage which afterwards took place were so dealt with that the stipulations for those children who were within the marriage consideration were made dependent upon the agreement that the others should take as they did. The children within the consideration were to take upon certain terms, and without giving them either more or less than that which the contract gave them, it was impossible to disappoint the others. Exactly the same was the principle of the case of *Clayton* v. *Wilton*,(*a*) though the form in which the question was raised was different, because it was a limitation by way of remainder occurring after a gift to male issue who were within the consideration of marriage, and before another gift to female issue in the like situation.' That is a construction of the decision of Lord HARDWICKE in *Newstead* v. *Searles* which makes it perfectly consistent with all the other cases on the subject of volunteers in a marriage settlement. According to that, the children of the wife by a former marriage were volunteers, but because their interests were so complicated and mixed up with the interests of the possible issue of the marriage then in contemplation

(*a*) 3 Madd. 302.

that they could not well be separated, they were treated as persons who were entitled to come to the court to have the articles of settlement enforced, and were treated as being brought in that way within the marriage consideration, or, at least, entitled to have the benefit of it, because otherwise the settlement would be, or might be, defeated, even as to the children of the contemplated marriage, who were, undoubtedly, within the marriage consideration. The point had previously come before HALL, V.C., in *Price* v. *Jenkins*,(*b*) and he had taken the same view of *Newstead* v. *Searles* and given a similar explanation. In 1891, in the case of *De Mestre* v. *West*,(*c*) in the Privy Council, Lord SELBORNE again had to consider the case of *Newstead* v. *Searles*. In the meantime the point had come before me in the case of *In re Cameron and Wells*,(*d*) and I had the presumption to say that the explanation of Lord SELBORNE was a very ingenious one, but that I could not quite reconcile it with all the language used by Lord HARDWICKE in *Newstead* v. *Searles*. Lord SELBORNE, in *De Mestre* v. *West*, referred to *Price* v. *Jenkins*, and to *In re Cameron and Wells*, in which it was attempted to extend the supposed doctrine of *Newstead* v. *Searles* to the children of the husband by a former marriage, and I declined to carry it any further. He then says this: 'The general rule has long been settled that a voluntary conveyance, even though from the most honest motives and the most moral considerations, may be defeated, according to the construction which has been put upon the statute of 27 Eliz. c. 4, by

(*b*) 4 Ch. D. 483.
(*c*) 91 A. C. 264.
(*d*) 37 Ch. D. 32.

a subsequent conveyance to a purchaser for value, such as was made in this case. It has also been determined in a manner which it would be too late to attempt to review, in the case, amongst others, of *Sutton* v. *Chetwynd*,(*a*) and in the Irish case of *Cormick* v. *Trapaud*,(*b*) both decided by the House of Lords, that the rule is applicable to limitations in favour of volunteers under marriage settlements. Therefore, as the law is so settled, some special reason, consistent with that law, must be shown for taking any particular case out of the rule. Whether their lordships would have established such a rule had the matter been new is not the question. The case which has been mainly relied upon as an authority for allowing this appeal is one in the Court of Exchequer, of *Dickenson* v. *Wright*,(*c*) which was affirmed in the Court of Exchequer Chamber under the title of *Clarke* v. *Wright*.(*d*) Their lordships probably would agree that if that case ought to be followed it might be an authority in support of the present appeal. But they observe not only that Lord ST. LEONARDS, in editions of his book on vendors and purchasers, later than *Clarke* v. *Wright*; but subsequent judges, HALL, V.C.—a great judge in this branch of law especially—and the present KAY, L.J., have unfavourably criticised that decision. And when the reasons given for that decision, and the state of opinion apparent from the report of what took place in the Court of Exchequer Chamber comes to be examined, it seems to their lordships impossible that

(*a*) 3 Mer. 249.
(*b*) 6 Dow. 60.
(*c*) 5 H. & N. 401.
(*d*) 6 H. & N. 849.

it can be supported. In the Court of Exchequer, where the judgment was given by Baron BRAMWELL, it is apparent that the court proceeded upon the view that the case of *Newstead* v. *Searles*(*e*) was an authority for a proposition that a settlement by a widow about to marry, upon her children by a former marriage, is good against a subsequent mortgagee, putting it in that general way, without any reference to any more special reasons ; and, no doubt, if that had been so, it would have been difficult to resist the conclusion drawn by the Court of Exchequer that, by parity of reasoning, the same rule would apply in favour of an illegitimate child. *Clayton* v. *Lord Wilton*(*f*) was also referred to by the same learned judge as having determined that a limitation in a marriage settlement to the children of a possible second marriage is good without reference to special circumstances. Unless the view so taken of those previous authorities of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* was correct, the foundation of that judgment fails. In the Court of Exchequer Chamber their lordships find a very great conflict of opinion amongst the judges, and, plainly, the majority of the judges would have been for reversing the judgment below if they had not taken the same view of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* which was taken by CHANNELL, B. No doubt two very learned judges in that court, BLACKBURN, J., and WILLIS, J., put the case upon a different ground, and endeavoured to explain in a different way the decisions in *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*, the ground taken by them being apparently this, that if it can be

(*e*) 1 Atk. 264.
(*f*) 4 M. & S. 67.

inferred from circumstances that the parties had specially in view when they made their agreement, provision to be made for persons who would otherwise have been volunteers, they were no longer volunteers, because it was a matter of special bargain, although there might be no other valuable consideration for that agreement than the marriage. In other words, that, although *primâ facie* provisions in favour of collaterals in marriage settlements were not within the marriage consideration, yet they might always be brought within it if the parties so intended. No other authority was cited in favour of that proposition, and, if sound, it would go far to destroy the general rule, for it is recited in almost every marriage settlement that all the provisions made by it, whether for the parties themselves and the issue of the marriage, or for anyone else, are made pursuant to agreement; and if, as BLACKBURN, J., appears to have thought, the acceptance by a husband of interests in his wife's property, different from those which the law would have given him if there had been a marriage without any settlement, would be a sufficient consideration to support limitations to collaterals against a purchaser for value. This, or something equivalent, may be said to occur in every case in which any property of the wife is brought into settlement. Nor do their lordships think that the omission to provide in a marriage settlement for all or some of the issue of the marriage can operate as a consideration in favour of persons provided for by it who would otherwise be volunteers. The majority of the judges in *Clarke* v. *Wright* differed from BLACKBURN, J., on these points, and if *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* had been understood as their lordships understand those cases *Clarke* v.

Wright would not have been decided as it was. Under those circumstances, it appears to their lordships to be their duty to advise Her Majesty in accordance with the view which they themselves take of *Newstead* v. *Searles*(*a*) and *Clayton* v. *Lord Wilton*,(*b*) and which was taken by the House of Lords in *Mackie* v. *Herbertson*.(*c*) The order of the limitations in both those cases was such, that the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument without also giving effect to the others. It was on that ground, and not from any special favour to provisions for the benefit of children who were not issue of the marriage, that their lordships consider both these cases to have been determined. If similar circumstances should occur in any other case it may be inferred from what was said in the House of Lords, in *Mackie* v. *Herbertson*,(*c*) that the same principle would be applied, and, indeed, the principle seems to be clear, for the settlement in any such case could not be defeated without defeating the interests of children unquestionably within the consideration of marriage. There is no authority for the proposition that under the statute a particular limitation can be picked out of the middle of a settlement, or the shares of some persons who would take *pari passu* with others, according to the terms of the settlement picked out, in order to be destroyed, in favour of a subsequent purchaser, leaving subsequent

(*a*) 1 Atk. 264.
(*b*) 6 M. & S. 67.
(*c*) 9 App. Cas. 303.

or concurrent interests of persons who were within the consideration of marriage under the same settlement undisturbed."

And he then proceeds to show that there was not enough in the case before the court to bring it within *Newstead* v. *Searles*(*a*) as thus understood.

KAY, L.J., then proceeds: "We have, then, two authoritative explanations of the real grounds of *Newstead* v. *Searles* given by no less an authority than Lord SELBORNE, after it had been canvassed in the intermediate cases to which reference was made; and I cannot for a moment doubt that if the question, what was the meaning of and what was, in fact, the decision in *Newstead* v. *Searles* should now come before the House of Lords they would follow the view expressed by Lord SELBORNE in *Mackie* v. *Herbertson*, and repeated by him in *De Mestre* v. *West*. If so, it would be idle for this court to hold that Lord HARDWICKE did not mean that which Lord SELBORNE says that he meant, that the decision was not upon the ground on which Lord SELBORNE puts it, but that it was a decision that children of the wife by a former marriage come within the marriage consideration of a settlement made upon a subsequent marriage."

Limitations to collaterals in a marriage settlement may sometimes be supported on the ground that the settlement could not have been made without the concurrence of some person who had a right to stipulate for the insertion of the said limitations. Thus, in *Roe* v. *Milton*,(*b*) the husband was the settlor, and upon his marriage he executed a settlement which contained a limitation to his own brothers. The settlement could not

(*a*) 1 Atk. 264.

(*b*) 2 Wilson, 356; *Jones* v. *Boulter*, 1 Cox, Eq. Ca. 288.

have been carried into effect without the concurrence of the settlor's mother, who released part of the lands comprised in the settlement from an annuity to please the lady's friends. It was decided that the settlor's mother must be considered to have stipulated for the insertion of the limitation to her sons, as the consideration for her joining in the settlement; and that, therefore, the limitation was not voluntary.

Resettlements of family estates between a father, tenant for life, and his son, tenant in tail, frequently take place; generally on the occasion of the son's marriage. Limitations to collaterals contained in such instruments may be supported on the supposition of their having been made the subject of special stipulation by the contracting parties, each of whom had a right to draw back unless his proposals in favour of his relatives were acceded to. The rule upon this subject is clearly stated by Lord ELDON in the case of *Pulvertoft* v. *Pulvertoft*.(*c*) In *Jenkins* v. *Keymis*,(*d*) Sir N. K. was tenant for life, with remainder to his son in tail, with remainder over. On the son's first marriage, in consideration of the said marriage and of 2,500*l*. portion paid with the wife, the estate was resettled upon Sir N. K. for life, with remainder to his son in tail special, with remainder to his son in tail GENERAL, with remainder over, and with power to Sir N. K. to charge 2,000*l*. It was held, that the limitation to the children of the son by a second wife was not voluntary, and, therefore, could be supported against subsequent purchasers.

(*c*) 18 Ves. 84, 92.
(*d*) 1 Lev. 150, 237.

Limitations to collaterals in a marriage settlement after a VESTED estate tail have been supported against subsequent purchasers. Thus, in *Lord Teynham's Case*,(a) a father, upon the marriage of his eldest son, settled estates upon the eldest son in tail, with remainder to the father's second son in tail; and it was held, that the limitation to the second son was not fraudulent against purchasers, because it was after an estate tail, which could be barred at any time, and might endure for ever.

(a) 2 Levinz, 105. See *Staplehill* v. *Bully*, Pr. Ch. 224; Sugden V. & P. (14th edit.), 713.

CHAPTER III.

Concerning Post-nuptial Settlements in pursuance of Ante-nuptial Articles and Agreements.

A SETTLEMENT executed after marriage in pursuance of an ante-nuptial agreement IN WRITING stands on the same footing, with respect to creditors and subsequent purchasers, as a settlement executed before marriage.(*b*) Consequently the remarks made in the preceding chapter with respect to the marriage consideration, and its effect in supporting the limitations to the husband and wife and the issue of the marriage, together with the observations upon limitations to collaterals, apply with as much force to post-nuptial settlements in pursuance of ante-nuptial written articles as to ante-nuptial settlements.

Although articles for a marriage settlement receive a very liberal construction, and words, which would under ordinary circumstances give an estate tail to a parent, will generally be interpreted so as to give him an estate for life only, with remainder in strict settlement to his issue; nevertheless, if a post-nuptial settlement extends to a class of persons which was not contemplated by the ante-nuptial agreement, the settlement, so far as the limitation to these persons is concerned, will be unsupported by the marriage consideration, and therefore void against creditors and subsequent purchasers. Consequently, a bond given by a husband before marriage to provide a jointure for his wife will

(*b*) *Martin* v. *Scamore*, 1 Ch. Ca. 170; *Doe* d. *Earnes* v. *Rowe*, 6 Scott, 525; *Brunsden* v. *Stratton*, Pr. Ch. 520.

not support a settlement executed after marriage upon the wife and the issue. The limitation to the issue is voluntary, and void against creditors and subsequent purchasers.(*a*) Where there has been in a post-nuptial settlement a giving up by the husband of an estate which he had in his wife's property, such a deed, though for valuable consideration between the husband and wife, is voluntary as regards the then existing or future children of the lady, and cannot be enforced by them.(*b*)

Moreover, the agreement in pursuance of which the settlement is made must have been a binding one ; and therefore a settlement made after marriage in pursuance of an ante-nuptial agreement which could not have been enforced against the settlor is a voluntary instrument, and of no avail against creditors.(*c*) It follows from this that a post-nuptial settlement in pursuance of an ante-nuptial agreement which is not in writing and signed in the manner required by the Statute of Frauds will not be supported against the claims of the settlor's creditors ;(*d*) unless there are circumstances (other than the marriage itself), amounting to part

(*a*) *Jason* v. *Jervis*, 1 Vernon, 286 ; and see *Gates* v. *Fabian*, 19 W. R. 61 ; *Doe* v. *Rowe*, 4 Bing. N. C. 737.

(*b*) *Green* v. *Paterson*, 32 Ch. D. 95.

(*c*) See *Greene* v. *Cramer*, 2 C. & L. 54 ; *Beaumont* v. *Carter*, 32 Beav. 586 ; *Luders* v. *Anstey*, 4 Ves. 501 ; *Caton* v. *Caton*, L. R. Ch. 137 ; L. R. 2 H. L. 127 ; but see *Williams* v. *Williams*, 37 L. J. Ch. 854 ; *Ex parte Gardner*, 11 Ves. 40 ; *Ex parte Campbell*, 16 Ves. 244 ; *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*d*) *Field* v. *White*, 29 Ch. D. 358 ; *Warden* v. *Jones*, 23 Beav. 487. The Statute of Frauds does not apply to mutual promises to marry, but only to promises to make a settlement or to do some collateral act in consideration of the marriage. Buller N. P. 280 (*c*) ; *Jorden* v. *Money*, 5 H. L. 185, 207, observed on in *Piggott* v. *Stratton*, 1 De G. F. & J. 33 ; considered *Loftus* v. *Maw*,

performance of the contract to take the case out of the statute.(*e*)

In *Trowell* v. *Shenton*,(*f*) an infant wrote to his intended wife promising that on coming of age he would give her seven specific houses. He was married in 1859, after coming of age. In 1872 he executed a deed not referring to any previous agreement, by which he conveyed the above and two other houses to trustees upon trust for his wife for life, for her separate use, and after her death upon trust for himself for life, and after the death of the survivor, upon such trusts as the wife should by deed or will appoint, and in default in trust for her in fee. He subsequently agreed to sell three of the houses, and the purchaser sued for specific performance.

It was held by the Court of Appeal (reversing HALL, V.C.) that the purchaser was entitled to specific performance, because the settlement did not refer to the previous agreement; dealt with other property besides that mentioned in the letter of 1857, and settled the

3 Giff. 604; approved *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, L. R. 6 H. L. 352.

(*e*) *Lassence* v. *Tierney*, 1 Mac. & Gor. 551, 571; approved *Kellett* v. *Kellett*, L. R. 3 H. L. 160; *Warden* v. *Jones*, 23 Beav. 487; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Ungley* v. *Ungley*, 4 Ch. D. 73; 5 Ch. D. 887; *Alderson* v. *Maddison*, 7 Q. B. D. 174; *Randall* v. *Morgan*, 12 Ves. 67; *Taylor* v. *Beech*, 1 Ves. sen. 297; *Caton* v. *Caton*, L. R. 1 Ch. 137; L. R. 2 H. L. 127. Where the rights of creditors do not intervene, the requirements of the Statute of Frauds are satisfied by a post-nuptial settlement or memorandum in writing, referring to a parol promise made before the marriage. *Williams* v. *Williams*, 37 L. J. Ch. 855. See *Hammersley* v. *De Biel*, 12 C. & F. 45; *Trowell* v. *Shenton*, 8 Ch. D. 318, and cases therein referred to.

(*f*) 8 Ch. D. 318.

property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement, therefore, was voluntary, and void as against a purchaser for value.

This case was decided on the ground that there had been no ratification under *Lord Tenterden's* Act. See also the judgments in this case. It appears now to be the law that a parol agreement before marriage will not support a post-nuptial settlement, which will, therefore, be void against creditors and subsequent purchasers.

The evils which would occur if the courts were to uphold against creditors a post-nuptial settlement made in pursuance of a parol contract are clearly pointed out by Lord NORTHINGTON in the case of *Spurgeon* v. *Collier*.(*a*) He said: "If a parol agreement entered into before marriage were to be allowed to give effect to a settlement executed subsequently to the marriage, it would be the most dangerous breach of the Statute of Frauds, and a violent blow to credit. For any man on the marriage of a relation might make such a promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed he would execute a settlement pursuant to his promise, and defraud all his creditors." In *Goldicutt* v. *Townsend*,(*b*) during the negotiations which preceded the marriage of the Rev. Townsend with Miss Ditmas, the father of Mr. Townsend promised to leave his son and his children the sum of 5,000*l*. The promise was by

(*a*) 1 Eden., 61; *Battersbee* v. *Farrington*, 1 Swanston 106, 113; *Randall* v. *Morgan*, 12 Ves. 67. See *Dundas* v. *Dutens*, 1 Ves. jun. 196. JESSEL, M.R., appears to have disapproved of this case: see *Trowell* v. *Shenton*, *ante*; see also *Nurse* v. *Durnford*, 13 Ch. D. 764.

(*b*) 28 Beav. 445.

parol, and it was not shown that the marriage was celebrated upon the faith of it. Two years after the mariage the father executed a bond to secure the sum of 5,000*l.*, payable within six months after his decease, and by a contemporaneous deed this sum was settled on the Rev. Townsend, his wife, and children. The father died without leaving sufficient assets to pay his debts, and it became necessary to determine whether the bond given after the marriage could be supported against his creditors. It was held by the Master of the Rolls that the bond and settlement, having been executed merely in pursuance of a parol promise, were without consideration and void against creditors.(*c*)

Marriage is not such a part performance of a contract in consideration of marriage as will take the case out of the Statute of Frauds ; for, as the court observed in the case of *Caton* v. *Caton*,(*d*) " marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity." In *Warden* v. *Jones*,(*e*) a husband prior to his marriage entered into a parol contract to settle his intended wife's property. No settlement was executed by him till after the marriage. A creditor's suit was instituted in order to set aside the instrument as voluntary and fraudulent, inasmuch as the husband was greatly indebted at the time of its execution. One defence was, that the case was taken out of the Statute

(*c*) See also *Hogarth* v. *Phillips*, 4 Drew. 360 ; *Mignon* v. *Parry*, 31 Beav. 211 ; *Trowell* v. *Shenton*, *ante* ; *M'Askie* v. *M'Cay*, 2 Ir. Rep. Eq. 447 ; *L'Estrange* v. *Robinson*, 1 Hogan, 202 ; *Spicer* v. *Spicer*, 24 Beav. 365 ; *In re Gulliver*, 2 Jur. (N.S.) 700.

(*d*) L. R. 1 Ch. 137, 147 ; L. R. 2 H. L. 127, S. C.

(*e*) 23 Beav. 487 ; *Trowell* v. *Shenton*, 8 Ch. D. 324.

of Frauds by reason of the marriage being a part performance of the husband's contract. But the Master of the Rolls said :—"The statute expressly states that a parol agreement made upon consideration of marriage shall not in fact constitute a valid agreement, and that no action shall be brought to charge any person on it. If it had not been for the positive words of the statute it is probable, having reference to the doctrine of this court upon matters of part performance, that it would have been held that the marriage was a part performance of the contract. The words of the statute are, 'that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith.'(*a*) But for that statute, I apprehend, having regard to the doctrine of a Court of Equity with respect to part performance, a parol agreement followed by marriage would have been treated as a part performance. Certainly it is quite as much a part performance as a parol agreement for the sale of lands, where the whole of the purchase money is paid ; but here it is more, the whole of the consideration is paid and the purchaser has been put into possession. The words of the statute, however, are precise upon the point."(*b*)

Where the property which is agreed to be settled is before the marriage actually transferred into the hands of trustees, the trusts upon which the property is to be

(*a*) 29 Car. 2, c. 3, s. 4.

(*b*) Pages 492, 493 ; and see *Lassence* v. *Tierney*, 1 M. & G. 551 ; *Kellett* v. *Kellett*, L. R. 3 H. L. 160 ; *Taylor* v. *Beech*, 1 Ves. sen. 297 ; *Redding* v. *Wilkes*, 3 Bro. C. C. 400 ; *Shadwell* v. *Shadwell*, 30 L. J. C. P. 145 ; *Trowell* v. *Shenton*, 8 Ch. D. 318 ; *Barkworth* v. *Young*, 4 Drew. 1.

held may be declared subsequently to the marriage; and creditors will not be able to invalidate the instrument containing the declaration of trust on the ground that it is post-nuptial and voluntary.(*c*) The rule on this subject is thus stated by the Master of the Rolls in the case of *Cooper* v. *Wormald*:(*d*) "If a man, upon his marriage with a lady, enters into a mere parol agreement with her that a sum of money shall be transferred to trustees upon trusts for himself, his intended wife, and the children of the marriage, and the money is before the marriage actually transferred to the trustees, who hold it solely upon the trusts agreed upon, the fact that the instrument declaring the trusts is executed by them subsequently to the marriage does not make it a voluntary instrument, or enable creditors to set it aside on the ground that it is not made BONA FIDE in consideration of the marriage." Where a husband allowed money to remain in his wife's former name in the bank and allowed her to go on drawing cheques for the interest, and the principal as she required it, in order to carry into effect a promise which he had made to her before marriage, the Court of Appeal without going into the question of the Statute of Frauds, held that after the marriage the husband gave this money to the wife for her separate use, and had made himself a trustee of it for her, and, therefore, his creditors were not entitled to it.(*e*)

Although the Statute of Frauds requires promises relating to marriage to be in writing; nevertheless in

(*c*) The Statute of Frauds, section 7, requires declarations or creations of trusts of LANDS to be manifested or proved by writing.

(*d*) 27 Beav. 266; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571.

(*e*) *Ex parte Whitehead*, 14 Q. B. D. 419, and cases there quoted.

cases of fraud equity will relieve in spite of the words of the statute.(*a*) Therefore, if the execution of an ante-nuptial agreement be prevented by collusion or fraud, equity will treat the agreement as if it had actually been executed.(*b*) In *Montacute* v. *Maxwell*,(*c*) where the husband privately countermanded the instructions which he had given for a settlement, and then induced the wife by persuasions and assurances to marry him, the court held the settlement to be binding upon him. But if there is no fraud on the part of the husband, but merely a reliance by the wife upon his promise to make adequate provision for her and the children of the marriage, then, as the Statute of Frauds makes these promises void unless they are in writing, equity will not interfere.(*d*) And it is a well-established rule, both at law and in equity, that if a person, with the view of inducing others to celebrate a marriage, makes parol representations, in reliance upon which the marriage afterwards takes place, he will be estopped from denying it, and compelled to make his representations good, and will not be allowed to screen himself from liability by setting up the Statute of Frauds, which requires all promises relating to marriage to be in writing. The principle upon which these cases seem to be decided, is that the Statute of Frauds only applies to *agreements*, and does not include *representations*, and, therefore, has no application in this class of case.

(*a*) *Montacute* v. *Maxwell*, 1 P. Wms. 620 ; *Mallet* v. *Halfpenny*, 1 Eq. Ca. Abr. 20.

(*b*) *Middleton* v. *Middleton*, 1 J. & W. 94.

(*c*) 1 P. W. 620.

(*d*) *Per* Lord HARDWICKE in *Montacute* v. *Maxwell*, 1 P. W. 620. See *Warden* v. *Jones*, 23 Beav. 487 ; *Caton* v. *Caton*, L. R. 2 H. L. 127.

The two leading cases on this subject are *Hammersley* v. *De Biel*(*e*) and *Jorden* v. *Money*;(*f*) in the former of which Lord COTTENHAM said: "The principle of law, at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal."(*g*) The case of *Jorden* v. *Money*,(*h*) shows that this rule is to be confined to MISREPRESENTATIONS OF FACTS, and that it is not to be extended to statements made by a person of something that he INTENDS or does not INTEND to do with reference to an impending marriage. This distinction lies in this, that where one person, by misrepresenting certain facts, induces another to alter his condition, or to enter into a marriage, this amounts to a fraud, and the party making the representation ought to be compelled to act up to it; whereas the mere expression of INTENTION to do or to leave undone any particular thing with reference to a marriage is not a misrepresentation, but can amount at the most to a contract, which the Statute of Frauds requires to be in writing and signed by the party to be charged upon it.(*i*)

(*e*) 12 C. & F. 45, 78. See *Bold* v. *Hutchinson*, 20 Beav. 250; *Smith* v. *Kay*, 7 H. of L. 751; *Williams* v. *Williams*, 37 L. J. Ch. 854.

(*f*) 5 H. of L. 185.

(*g*) 12 C. & F. 78, 79.

(*h*) *Supra*, note (*e*). Lord ST. LEONARDS dissented in this case from the other judges.

(*i*) See Lord CRANWORTH'S judgment in *Jorden* v. *Money*, 12

The rule laid down in *Hammersley* v. *De Biel* can only apply where the representations which are sought to be enforced were made in such terms and under such circumstances that it may fairly be inferred that they were intended to influence the conduct of another person; because no effect can be attached to loose and vague expressions made in the course of a correspondence or in conversation ;(*a*) or to erroneous recitals in a deed, which are evidently the result of a common mistake, and which all parties had an equal opportunity of discovering.(*b*)

In *Neville* v. *Wilkinson*,(*c*) Neville, being about to marry, procured a statement of his pecuniary affairs to be drawn up by the defendant for the inspection of his

C. & F. 185, 215, 216. See also the remarks of Lord SELBORNE in the House of Lords in the case of *Citizens Bank of Louisiana* v. *First National Bank of New Orleans*, L. R. 6 H. L. 352, at p. 360, and cases there cited; and *Warden* v. *Jones*, 23 Beav. 487; *Williams* v. *Williams*, 37 L. J. Ch. 854; *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 804; *Ex parte Burrell*, 1 Ch. D. 552; *Alderson* v. *Maddison*, 8 A. C. 467.

(*a*) *M'Askie* v. *M'Kay*, 2 Ir. R. Eq. 447; *Williams* v. *Williams*, 37 L. J. Ch. 854; *In re Gulliver*, 2 Jur. (N.S.) 700; *Maunsell* v. *White*, 4 H. of L. 1039; *Kay* v. *Crook*, 3 K. & J. 407; *Jamieson* v. *Steins*, 21 Beav. 5. See *Ward's Case*, 10 L. R. Eq. 659, 662.

(*b*) *Evans* v. *Wyatt* 31 Beav. 217; *Ainslie* v. *Medlycott*, 9 Ves. 13, 21.

(*c*) 1 Bro. Ch. Ca. 543; *De Manneville* v. *Crompton*, 1 V. & B. 354; *Ainslie* v. *Medlycott*, 9 Ves. 21; *Scott* v. *Scott*, 1 Cox, 366; *Eastabrook* v. *Scott*, 3 Ves. jun. 456; *Ex parte Carr*, 3 V. & B. 111; *Palmer* v. *Neave*, 11 Ves. 165; *Yeomans* v. *Williams*, L. R. Eq. 184; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Greene* v. *Cramer*, 2 Con. & Law. 54; *Loxley* v. *Heath*, 1 De G. F. & J. 489; *Madox* v. *Nowlan*, Beatty, 632; *Mallett* v. *Halfpenny*, 2 Vernon. 373; *M'Keogh* v. *M'Keogh*, 4 Ir. Rep. Eq. 338; *Ungley* v. *Ungley*, 5 Ch. D. 887.

intended father-in-law. In this statement were included some demands of the defendant upon Neville, who thereupon told the defendant that his intended wife's friends would never consent to the marriage if his debts were represented as so large in amount. This led the defendant to omit any mention of his own demands on Neville, and to make several verbal representations for the purpose of more effectually concealing his claims from Neville's intended father-in-law. The marriage took place on the faith of these representations, and afterwards the defendant took proceedings for the purpose of recovering his debt. It was held that he ought to be restrained by injunction; and the Chancellor added his opinion, that the defendant could not ever at any time afterwards recover these demands from Neville. In *Montefiori* v. *Montefiori*,(*d*) Joseph Montefiori being about to marry, his brother Moses, in order to represent him as a man of fortune, gave him a note for a large amount as the balance of accounts between them, though in truth no such balance ever existed. After the marriage Moses reclaimed the note as having been given without consideration. The arbitrators to whom the case was referred ordered the instrument to be delivered up; but this decision was reversed by the Court of Queen's Bench. Again, in *Gale* v. *Lindo*,(*e*)

(*d*) 1 W. B. 362; *Kirwan* v. *Burchell*, 10 Ir. Rep. Ch. 63; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; *Whitmore* v. *Mackeson*, 16 Beav. 126; *Goldicutt* v. *Townsend*, 28 Beav. 445.

(*e*) 1 Vernon, 475; *Redman* v. *Redman*, 1 Vernon, 348; *Hudson* v. *Cheyney*, 2 Vernon, 150; *Lamlee* v. *Hanman*, 2 Vernon, 466; *Turton* v. *Benson*, 1 P. W. 496; *Morrison* v. *Arbuthnot*, 8 B. Par. Ca. 247; and see also *Ex parte Gardner*, 11 Ves. 40; *Ex parte Campbell*, 16 Ves. 244; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Beaumont* v. *Carter*, 32 Beav.

a brother, on the treaty for the marriage of his sister, in order to make her fortune appear as large as possible, allowed her to have the sum of 160*l.* privately, and took her bond to repay it. The executor of the brother put the bond in suit against the executor of the sister, who survived her husband. Upon a bill to be relieved, the bond was decreed to be delivered up as fraudulent.

Where a marriage has been brought about by the misrepresentations of a third person, equity will not, in cases where either the wife or the children of the marriage are living, allow the interest of the husband under the settlement to be affected, although he may have been a party to the misrepresentations; for it is not possible to affect the interest of the husband without injuring the wife and family, upon whom the deceit has been practised.(*a*)

586; *Alt* v. *Alt*, 4 Giff. 84; *Laver* v. *Fielder*, 32 Beav. 1; *Walford* v. *Gray*, 11 Jur. (N.S.) 473; *Vincent* v. *Vincent*, T. Rep. (1886), 814.

(*a*) *Thompson* v. *Harrison*, 1 Cox, 344.

CHAPTER IV.

Concerning Post-nuptial and Voluntary Settlements.

A VOLUNTARY settlement is void against all creditors whose debts existed at the date of the instrument if it in any way delays or hinders them in realizing their debts out of the property comprised in it.(*b*) It is also void against creditors whose debts accrued subsequently, if an express intent to defraud them can be proved.(*c*) A voluntary settlement by a residuary legatee is void against the creditors of the testator's estate.(*d*)

A post-nuptial settlement, which is not in pursuance of an agreement in writing made before the marriage, is not a marriage settlement in the proper sense of that term, although expressed to be in consideration of the marriage, but is merely a voluntary instrument; and, therefore, cannot be supported if it delays creditors.(*e*) See the preceding chapter.

(*b*) 13 Eliz. c. 5.

(*c*) *Sperritt* v. *Willows*, 3 De G. J. & S. 293; *Ex parte Russell, re Butterworth*, 19 Ch. D. 588; *Ware* v. *Gardner*, 7 Eq. 317.

(*d*) *In re Troughton* (1894), W. N. 154.

(*e*) *Beaumont* v. *Thorpe*, 1 Ves. sen. 27. A settlement executed after a marriage in Scotland cannot be considered as ante-nuptial by reason of the marriage being re-celebrated in England. *Ex parte Hall*, 1 V. & B. 112; see *Dobbyn* v. *Adams*, 7 Ir. Ch. Rep. 173; *Adams* v. *Adams*, 8 Ir. Ch. Rep. 41. The statute 18 & 19 Vict. c. 43, which enables infants, upon or in contemplation of marriage, to make, with the approbation of the Court of Chancery,

Of course if it can be shown that the settlor received some special benefit, such as an additional portion, the surrender of an estate or the like, as a consideration for making the settlement, it will not be treated as voluntary, but will be supported against creditors. Post-nuptial settlements which have been upheld on these grounds against creditors will be considered in the next chapter. At present it is proposed to treat only of voluntary settlements.

The statute 13 Eliz. c. 5, declares that all feoffments, gifts, grants, alienations, &c., of lands, goods, and chattels made with the *intent* to hinder or delay creditors and others of their just and lawful remedies, shall be utterly void and of none effect. There has been great fluctuation of opinion, however, as to what will furnish sufficient evidence that a voluntary settlement was executed with the intention on the part of the settlor of defeating or delaying his creditors. In the earlier cases the mere fact of the settlor being in debt was considered enough to avoid the instrument. Thus in *Russell* v. *Hammond*(*a*) Lord HARDWICKE said, that he had hardly ever known of a case where the settlor was indebted at the time of the voluntary conveyance, and it was not held to be fraudulent; and he expressed himself to the same effect in *Walker* v. *Burrowes*.(*b*) In *Scarf* v. *Soulby*,(*c*) SHADWELL, V.C., pronounced against the

valid settlements of real or personal property, applies to post-nuptial settlements. See *Powell* v. *Oakley*, 34 Beav. 575.

(*a*) 1 Atk. 15; *Townsend* v. *Windham*, 2 Ves. sen. 10, 11; *Battersbee* v. *Farrington*, 1 Swanston, 106; *Holloway* v. *Millard*, 1 Madd. 414; *Lilly* v. *Osborn*, 3 P. W. 298.

(*b*) 1 Atk. 93; *Kirk* v. *Cureton*, 1 Cooper, Rep. Ch. Pr. 191.

(*c*) 16 Simon, 344; overruled 16 Simon, 481; *Middlecombe* v. *Marlow*, 2 Atk. 519; *Stileman* v. *Ashdown*, 2 Atk. 481.

validity of a voluntary settlement on similar grounds; though his opinion was afterwards overruled by Lord COTTENHAM.

Later decisions advanced the doctrine a step further; and it was held that the mere fact of the voluntary setllor being indebted was not sufficient to invalidate the settlement, but that he must have been insolvent or nearly so at the time he executed it. Thus in *Lush* v. *Wilkinson*, ARDEN, M.R., said: "Every man must be indebted for the common bills of his house, though he pays them every week. It must depend upon this: whether he was in insolvent circumstances at the time the settlement was made."(*d*)

Subsequent cases, however, have laid down the rule in terms more consistent with the spirit of the statute. The question of fraud does not now depend upon whether the settlement was voluntary, or the debtor insolvent at the time he made it; but upon whether, considering the amount of his debts, the nature of his property and its situation, and all the other circumstances of the case, the intention of the settlor in executing the instrument clearly appears to have been to hinder and delay his creditors.(*e*)

The rule which at present prevails on this subject is clearly stated by KINDERSLEY, V.C., in the case of

(*d*) 2 Ves. 384; *Holcroft's Case*, Dyer, 294 b; *Shears* v. *Rogers*, 3 B. & Ad. 362; *Manders* v. *Manders*, 4 Ir. Eq. Rep. 434; *Martyn* v. *M'Namara*, 4 Dr. & War. 411, 427; *Turnley* v. *Hooper*, 3 Sm. & Giff. 349; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*e*) *Jenkyn* v. *Vaughan*, 3 Drew. 419, 424; *French* v. *French*, 6 De G. M. & G. 95; *Clement* v. *Eccles*, 11 Ir. Eq. Rep. 229; *Denison* v. *Tattersall*, 18 L. T. (N.S.) 303; *Crossley* v. *Elworthy*, L. R. 12 Eq. 188. See also cases in note (*k*).

Thompson v. *Webster*,(*a*) where he said: "The principle now established is this. The language of the Act being, that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder or delay creditors, the court is to decide in each particular case, whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor in making the settlement was to defeat, hinder or delay his creditors."(*b*)

Until a comparatively recent date there has been considerable judicial conflict of opinion whether an *intention* to defeat or delay creditors must be inferred *as a matter of law* where the reasonable and probable result of the settlement itself was to defeat or delay creditors, although the court might be convinced that, as a matter of fact, the settlor had no such intention. The cases above quoted in note (*b*) have at length settled this question as stated, and BOWEN, L.J., has explained how the confusion arose. He says:(*c*) "An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion

(*a*) 4 Drew. 628, 632; on appeal; 4 De G. & J. 600.

(*b*) See also *Godfrey* v. *Poole*, 13 App. Cas. 497, at p. 503; *Ex parte Mercer*, 17 Q. B. D. 290: *In re Johnson, Golden* v. *Gillam*, 20 Ch. D. 389, at p. 392; *Townsend* v. *Westacott*, 4 Beav. 58; *Scarf* v. *Soulby*, 16 Sim. 481; *Richardson* v. *Smallwood*, Jacob, 552; *Holmes* v. *Penney*, 3 K. & J. 90, 99; 26 L. J. Ch. 179, S. C.; *Acraman* v. *Corbet*, 1 J. & H. 411; *Christy* v. *Courtenay*, 26 Beav., 140; 13 Beav. 96, S. C.; *Graham* v. *O'Keefe*, 16 Ir. Ch. Rep. 1; *Luff* v. *Horner*, 3 F. & F. 480; *Ex parte Mayou*, 11 Jur. (N.S.) 433. The principle stated in the text applies to partnerships as well as to private individuals. Therefore a partner has no right to withdraw so much of his money from the partnership capital that the joint creditors are hindered or delayed. *In re Kemptner*, L. R. 8 Eq. 286.

(*c*) *Le Lievre* v. *Gould* [1893], 1 Q. B. 491, at p. 590.

that there had been fraud; and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury the judge would have pointed out to them that gross negligence *might* amount to *evidence of fraud*, if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not *of itself* amount to fraud. Cases of gross negligence, in which the Chancery judges decided that there had been fraud, were piled up one upon another, until at last *a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud and dishonesty were the proper* ratio decidendi, *and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest.*"

Lord ESHER, M.R., in *Ex parte Mercer; Re Wise*,(*d*) says: "No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words necessary result metaphysically, but in their ordinary business sense; and, of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But if other circumstances make you believe that a man did not intend to do that which you are asked to find that he did intend. To say that because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really

(*d*) 17 Q. B. D. 290.

believes to be untrue in fact." LINDLEY, L.J., in the same case, says: "The language which has been used in a great many cases, that a man must, *in point of law*, be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact—between consequences which can be foreseen with those which cannot."

A very good illustration of the rule that fraudulent intention is not to be presumed merely from the effect of the document, is to be found in the case of *Ex parte Mercer; Re Wise.*(*a*) In this case a master mariner was married at Hong Kong on 31st May, 1881. In August an action for breach of promise of marriage was commenced against him, and the writ was served upon him at Hong Kong on 8th October. By the same mail he heard that a legacy of 500*l.* had become payable to him. On 17th October he executed a post-nuptial settlement of the 500*l.* in favour of his wife and issue, being then indebted to no one. In July, 1882, judgment in the action went against him for 500*l.*; and in November, 1884, he was adjudicated bankrupt. It was attempted to set aside the post-nuptial settlement. The bankrupt, in giving his evidence, swore that when he made the settlement he was in no way influenced by the action having been commenced against him, which he thought would come to nothing. The Divorce Court and the Court of Appeal refused to set aside the settlement, on the ground that there was not sufficient evidence to warrant a judge or jury in finding that the settlement was intended to delay, hinder, or defraud creditors.

This case appears to decide that there must be suffi-

(*a*) 17 Q. B. D. 290; and see *Kent* v. *Riley*, 14 Eq. 190.

cient evidence to warrant a judge or jury in finding that the settlement was intended to delay, hinder, or defraud creditors within the statute of Elizabeth.

In the absence of direct evidence of fraudulent intent, it may (if there is no rebutting evidence) be inferred from the fact that the necessary result of the settlement was to defeat or delay the settlor's creditors. This inference is, however, as has been pointed out, one of fact only, and not an inference of law, and may be rebutted if the evidence as a whole shows that no such intention existed. The result of this is, that none of the reported cases of implied fraudulent intent can be relied upon as authorities, the question of intent being now purely one of fact in each particular case.

It is submitted that all questions of this class, *e.g.*:(*b*)

Where the property which remains in the hands of the settlor after the execution of a voluntary settlement is either insufficient for the payment of his existing debts, or is protected by some rule of law from being taken in execution.(*c*)

Where the property of the settlor, which remains after the voluntary settlement is executed, is of such a nature, or in such a situation, that the creditors will be obliged to wait a considerable length of time, or incur great expense before it can be realised; as if it be a

(*b*) *Freeman* v. *Pope*, 5 Ch. App. 540; *Smith* v. *Cherrill*, 4 Eq. 390; *Taylor* v. *Coenen*, 1 Ch. D. 636; *Crossley* v. *Elworthy*, 12 Eq. 159; *Adames* v. *Hallett*, 6 Eq. 468.

(*c*) *Clements* v. *Eccles*, 11 Ir. Eq. Rep. 237; *Graham* v. *O'Keefe*, 16 Ir. Ch. Rep. 1; *Strong* v. *Strong*, 18 Beav. 408; see also *French* v. *French*, 6 De G. M. & G. 95; *Jackson* v. *Bowley*, Car. & M. 97, 103; *Spirett* v. *Willows*, 3 De G. J. & S. 293; *Corlett* v. *Radcliffe*, 14 Moo. P. C. 121.

contingent interest, or be situated abroad, or consist of debts.(*a*)

Where the settlor was after the execution of the instrument in perfectly solvent circumstances, but has since divested himself of so much of the property which was reserved out of the settlement, that there is not enough left to pay the debts which he owed at the time the settlement was made.(*b*)

Where a voluntary settlement has the effect of hindering or delaying existing creditors.

Where a person has incurred a liability to pay a debt upon a contingency or at a future day, and then voluntarily assigns so much of his property that he has not the means of satisfying the debt when it becomes due.(*c*)

Or where such settlements have hindered or delayed persons to whom the settlor had previously to the date thereof become bound as surety for the payment of money,(*d*) or to whom he had given securities which were not payable till after his decease.(*e*)

All these cases, and others which could be mentioned, appear, in spite of the older authorities to the contrary, to be now governed by the above-mentioned rule.

(*a*) *Thompson* v. *Webster*, 7 Jur. (N.S.) 531 ; see p. 532, *per* Lord CRANWORTH ; *Chamley* v. *Lord Dunsany*, 2 Sch. & Lef. 714.

(*b*) See *Freeman* v. *Pope*, 5 L. R. Ch. 538, 544 ; 9 L. R. Eq. 206 ; *Crossley* v. *Elworthy*, 12 L. R. Eq. 158.

(*c*) *Crossley* v. *Elworthy*, 12 L. R. Eq. 158.

(*d*) See *Goodricke* v. *Taylor*, 2 De G. J. & S. 135.

(*e*) *Adames* v. *Hallett*, 6 L. R. Eq. 468 ; *Rider* v. *Kidder*, 10 Ves. 360 ; *Dening* v. *Ware*, 22 Beav. 184 ; *Spirett* v. *Willows*, 3 De G. J. & S. 293 ; see *Hamer's Devisees' Case*, 2 De G. M. & G. 366. And as to fraudulent assignments made by a tenant of a manor in order to defeat the lord of his heriot, see *Tyrer* v. *Littleton*, 2 Brownlow, 187, cited 10 Coke, Rep. 56 (*a*).

Where the settlor himself had no fraudulent intention, still, if it can be shown that the beneficiaries had, the settlement may be set aside. Thus, in *Cornish* v. *Clarke*,(*f*) a distribution by a debtor, when in a weak state of health, of the whole of his property amongst his children partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts, was held to be void against creditors under the statute, the court being satisfied on the evidence that the children were aware at the time that the creditors' claims would be defeated, though it did not appear that the debtor had any such intention.

In the absence of actual intention to defeat or delay creditors, a voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may, to a considerable amount, remain unpaid.(*g*)

Doubts appear to have been entertained at one time as to whether the statute 13 Eliz. c. 5, applied to creditors whose debts did not exist at the time the voluntary settlement was executed. But in the case of *Taylor* v. *Jones*,(*h*) Lord HARDWICKE said that the preamble of the Act spoke of creditors and "others"

(*f*) 14 Eq. 184. See, however, *In re Johnson*; *Golden* v. *Gillam*, 20 Ch. D. 389.

(*g*) *Kent* v. *Riley*, 14 Eq. 190; see also *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*h*) 2 Atk. 601; see *Pauncefoot's Case*, cited in *Twyne's Case*, 1 Smith's Leading Cases, 1; *Ex parte Wilson*, 22 W. R. 241.

who might be defrauded of their just debts; and that the word "others" seemed to be inserted to take in all manner of persons, as well creditors after, as before the settlement; and he referred to the enacting clause, in which the scope of the statute is plainly extended to *all* whose actions and suits may be in anywise hindered or delayed.

If positive evidence can be adduced of an intention to defeat *future* creditors the settlement will be treated as fraudulent against them, and will be set aside, although the settlor was not indebted at the time it was executed.(*a*) In *Murphy* v. *Abraham*,(*b*) a trader in solvent circumstances three days before entering into partnership by a voluntary deed conveyed all his property to trustees in trust for himself for life, or until bankruptcy or insolvency, and then in trust for his wife and children. Not long afterwards he became bankrupt. It was held that the settlement was evidently executed in order to screen his property from the claims of the partnership creditors; and that the transaction was, therefore, fraudulent and void. So, if a person in solvent circumstances makes a voluntary settlement of the bulk of his property, and immediately afterwards borrows a large sum of money, the settlement will be

(*a*) *Per* Lord HARDWICKE, in *Stileman* v. *Ashdown*, 2 Atk. 401; *Tarback* v. *Marbury*, 2 Vernon, 510; *Spirett* v. *Willows*, 3 De G. J. & S. 293.

(*b*) 15 Ir. Ch. Rep. 371; *Ware* v. *Gardner*, L. R. 7 Eq. 317; *Denison* v. *Tattersall*, 18 L. T. (N.S.) 303; *Graham* v. *Furber*, 14 C. B. 310; *Graham* v. *O'Keefe*, 16 Ir. Ch. Rep. 1; *Reade* v. *Livingstone*, 3 Johnson, Ch. Rep. 481, temp. Kent, C.; *Bebee Tokia Sherob* v. *Beglar*, 6 Moore, Ind. App. 510; *Crossley* v. *Elworthy*, 12 L. R. Eq. 158; *Spirett* v. *Willows*, 3 De G. & K. 293.

treated as fraudulent against the persons who lent the money, if it hinders or delays them.(*c*)

So, again, where the intention was shown to have been for the purpose of avoiding an anticipated judgment the settlement was upset, although the plaintiff was not a creditor at the time, and it did not appear that there were any other creditors, and although the daughter in whose favour the settlement was made was no party to the fraud, yet she was not protected because she had not given valuable consideration.(*d*) So, also, where a direct intention to delay future creditors can be shown, the settlement will be set aside. In *Spirett* v. *Willows*,(*e*) a settlor, solvent at the time, but who had contracted a debt which would fall due shortly, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and dissipated them, thus depriving the expectant creditor of the means of being paid, the court held that there was a direct intention to defeat the expectant creditor, and set the settlement aside.

Again, a baker, who had saved money, being about to purchase a grocery business, which he proposed to carry on in addition to his bakery business, made a voluntary settlement of the bulk of his property for the benefit of his wife and children. He afterwards bought the grocery business, and carried it on at a loss for about six months. He then sold it for what he had given for

(*c*) *Barling* v. *Bishop*, 29 Beav. 417; see p. 420; *Ex parte Mercer* 17 Q. B. D. 290.

(*d*) *Reise River Company* v. *Attwell*, 7 Eq. 347.

(*e*) 3 De G. J. & S. 293.

it, and afterwards carried on the bakery business alone, until he became bankrupt, about three years after the execution of the settlement, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had all been paid; yet on these facts it was held that (independently of the question whether he was solvent at the date of the settlement) the settlement was void as against his creditors, on the ground that it was evidently executed with the view of putting the settlor's property out of the reach of his creditors in case he shouid fail in the speculation on which he was about to enter, in carrying on a new business about which he knew nothing.(*a*)

JESSEL, M.R., in the above-mentioned case of *Ex parte Russell*, remarks: "A man is not entitled to go into a hazardous business, and immediately before doing so, to settle all his property voluntarily; the object being, "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss. That is the very thing that the statute of Elizabeth was meant to prevent."

And if a person who is greatly embarrassed executes a voluntary settlement, and then immediately afterwards borrows money with which he discharges the debts he owed at the time the settlement was made, he cannot set up the instrument against his new set of creditors, because it was evidently his intention at the time he executed it to incur fresh debts.(*b*) In *Holmes* v.

(*a*) *Ex parte Russell*; *Re Butterworth*, 19 Ch. D. 588; *Ware* v. *Gardner*, 7 Eq. 317; *Mackay* v. *Douglas*, 14 Eq. 106; *Ex parte Stephens*, 3 Ch. D. 807.

(*b*) *Richardson* v. *Smallworth*, cited in *Holmes* v. *Penny*, 3 K. & J. 99, 100, 103.

Penney,(*c*) it was held by WOOD, V.C., that a voluntary settlement, by which a person vests property in trustees with an absolute discretion to apply it in the maintenance and support of himself, his wife and children, or any of them, in such manner as the trustees shall think fit, is not fraudulent against subsequent creditors. The judge said that such a settlement was no more void than it would be if it were simply for the benefit of the wife and children of the settlor; and that the court could not treat the instrument as fraudulent merely because the settlor might possibly derive some advantage under it himself.

A power of revocation is a strong indication of fraud against future creditors; for it virtually leaves the property under the settlor's power, showing that he did not *bonâ fide* intend to put it beyond his own reach,(*d*) and is only a contrivance for his own benefit.(*e*) Actual notice of the deed to a creditor has, however, been held to make a difference in favour of the deed.(*f*)

Where a voluntary settlement is set aside as fraudulent against creditors whose debts existed at the time it was executed, the settled property becomes available for the payment of all the settlor's creditors, without regard to the time when their debts accrued.(*g*) Creditors whose debts were contracted subsequently to the date of the settlement may therefore enforce their claims against the property comprised in it, either by taking

(*c*) 3 K. & J. 90, 100; *In re Cross*, 19 W. R. 153; *In re Pearson*, 3 Ch. D. 807.

(*d*) *Hungerford* v. *Earle*, 2 Vern. 261; *Tarback* v. *Marbury*, 2 Vern. 510; *Smith* v. *Hurst*, 10 Hare, 44.

(*e*) *Alton* v. *Harrison*, L. R. 4 Ch. 626.

(*f*) *Sagittary* v. *Hide*, 2 Vern. 44.

(*g*) See cases in next note.

out execution during the life of the settlor, or by coming in with his general creditors after his death.

It results from this, that a subsequent creditor has an equity to set aside a deed which is proved to be fraudulent against existing creditors. For the purpose of asserting this equity he is entitled to file a bill ; but before he can obtain the assistance of the court it is necessary that he should show, either that the settlement was made with the express intention of delaying, hindering, or defrauding creditors, or that all the debts which the settlor owed when he made the settlement have not been paid ; otherwise no foundation is laid for avoiding the settlement as a fraud upon existing creditors, inasmuch as the fact of the settlor having discharged his obligations to them completely negatives the ideas that he had any intention to defeat or delay them.(*a*) If there is any doubt as to the state of the settlor's circumstances at the time he made the settlement, or as to whether he has paid off all his then existing creditors, the court will direct an inquiry.(*b*)

(*a*) *Jenkyn* v. *Vaughan*, 3 Drew. 419 ; see p. 425 ; *Richardson* v. *Smallwood*, Jacob, 552 ; *Freeman* v. *Pope*, L. R. 9 Eq. 206, S. C. ; *In re Mercer* v. *Wise*, 17 Q. B. D. 290 ; see *Ede* v. *Knowles*, 2 Y. & C. C. C. 178, *contra*. And see also *Stephens* v. *Olive*, 2 Bro. C. C. 90 ; *Lush* v. *Wilkinson*, 5 Ves. 387 ; *Kidney* v. *Coussmaker*, 12 Ves. 136, 156 ; *Montague* v. *Lord Sandwich*, 12 Ves. 155 *n.* ; *Leukner* v. *Freeman*, Pr. Ch. 105 ; *St. Armand* v. *Jersey*, 1 Comyn, 255.

(*b*) *Jenkyn* v. *Vaughan*, 3 Drew. 419 ; *Richardson* v. *Smallwood*, Jacob, 552 ; *Scarf* v. *Soulby*, 1 Mac. & Gor. 364 ; *Townsend* v. *Westacott*, 2 Beav. 340, 345 ; *Christy* v. *Courtenay*, 13 Beav. 96, 101. A deed assigning the whole of a debtor's property to a particular creditor cannot be impeached in bankruptcy if all the debts which existed at the date of the deed have since been discharged. *Ex parte Taylor*, 5 De G. M. & G. 392.

A voluntary settlement cannot be impeached by creditors, if the instrument itself provides for the payment of debts ;(*c*) nor in cases where the debts are fully secured by mortgage or otherwise.(*d*)

As every instrument under seal imports a consideration on the face of it and may be sued on in a court of law, a voluntary settlement which delays or defeats a creditor cannot be sustained against him on the ground that his debt accrued under a voluntary bond or deed, any more than if he was a creditor for value.(*e*)

The creditor of an insolvent debtor who dies without being adjudicated a bankrupt is entitled to the benefit of any payment or security made or given by the debtor although such security or payment would, in the case of bankruptcy, have been set aside as a fraudulent preference.(*f*)

In administering the settlor's assets, however, creditors by voluntary bond or covenant are postponed to creditors for value, though the former are paid in preference to legatees.(*g*)

In order that creditors may be able to set aside an instrument it is not necessary that they should be able to prove that it was *wholly* without consideration. It will be equally liable to be avoided if the consideration is grossly inadequate to the value of the property con-

(*c*) *George* v. *Millbanke*, 9 Ves. 190 ; *Nunn* v. *Wilsmore*, 8 T. R. 521.

(*d*) *Manders* v. *Manders*, 4 Ir. Eq. Rep. 434 ; *Muex* v. *Howell*, 4 East, 1 ; *Stephens* v. *Olive*, 2 Bro. C. C. 90.

(*e*) *Adames* v. *Hallett*, 6 L. R. Eq. 468 ; but see *Dening* v. *Ware*, 22 Beav. 184.

(*f*) *Middleton* v. *Pollock*, 2 Ch. D. 104.

(*g*) See *infra*, Chapter XV., sect. 3.

veyed ;(*a*) but the courts will not closely criticise a transaction which is honest and open, and the terms of which are fair and reasonable.(*b*)

In the case of *In re Maddever*; *Three Towns Banking Company* v. *Maddever*,(*c*) where a specialty creditor brought an action to set aside a conveyance as fraudulent under the statute of Elizabeth, nearly ten years after the death of the grantor. The plaintiff had been aware of the facts during the whole of that period and could give no satisfactory reason for his delay. It was held that he was coming to enforce a legal right ; therefore, his mere delay in taking proceedings was no defence, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law.

It is desirable before concluding this chapter to refer to the provisions relating to voluntary and post-nuptial settlements which are contained in the Bankruptcy Act, 1883, and the Married Women's Property Act, 1882.

By section 47 of the former of these Acts it is enacted that :—

(1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser(*d*) or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor

(*a*) *Penhall* v. *Elwin*, 1 Sm. & Giff. 258 ; *Bradbury* v. *Hunter*, 3 Ves. 187 ; *Matthews* v. *Feaver*, 1 Cox, Eq. Ca. 278 ; *Howard* v. *Earl of Shrewsbury*, L. R. 2 Ch. 760.

(*b*) See *Nunn* v. *Wilsmore*, 8 T. R. 521 ; *Maguire* v. *Nicholson*, Beatty, 592 ; *Blount* v. *Doughty*, 3 Atk. 481.

(*c*) 27 Ch. D. 523.

(*d*) *Mackintosh* v. *Pogose* [1895], 1 Ch. 505.

of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt, at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2.) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in bankruptcy.(*e*)

(3) "Settlement" shall for the purposes of this section include any conveyance or transfer of property.

By section 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it is provided that:—A married woman may by virtue of the power of making contracts hereinbefore contained, effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

(*e*) See Chapter II., p. 10.

A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, &c. The remainder of the section provides for the appointment of trustees or new trustees, and that the receipt of such trustees shall be a good discharge for moneys paid to them.

CHAPTER V.

Concerning Post-nuptial Settlements which are Supported by Valuable Consideration—and Concerning Bonds Given in Substitution for Voluntary Bonds.

POST-NUPTIAL settlements, which are executed in pursuance of an ante-nuptial agreement in writing, have been considered in a previous chapter. It has there been shown that such settlements cannot be treated as voluntary, any more than if they had been executed before the marriage. In this chapter it is intended to speak of post-nuptial settlements, which, though not in pursuance of any ante-nuptial agreement, may yet be enforced against creditors and subsequent purchasers, in consequence of valuable consideration having passed when the instruments were executed. In studying the following remarks the reader is, however, warned to remember the alteration made in the law as to purchasers under 27 Eliz. by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21). Some remarks will be made in the first place upon settlements which have originated in some contract or arrangement between the settlor and his wife subsequently to their marriage; and afterwards post-nuptial settlements resulting from transactions between the settlor and third parties will be considered.

It is settled that if a husband and wife, each of them having interests, no matter how much, or of what degree or of what quality, come to an agreement which

is afterwards embodied in a settlement, that is a bargain between husband and wife, which is not a transaction without valuable consideration.(*a*)

Although a husband and wife were previously to the passing of the Married Women's Property Act, 1882,(*b*) looked upon as one person in the eye of the law, and therefore, incapable of contracting together ; nevertheless in equity a married woman might in many cases enter into a contract with her husband, not only with reference to her separate property over which she has a power of alienation,(*c*) but also with reference to other matters, as to which she can be regarded for the purposes of the contract as if she was a *feme sole.*(*d*) Therefore, if a husband after marriage makes a settlement on his wife and children, in consideration of the wife parting with some interest in property or in money for his benefit, or by waiving her equity to a settlement,(*e*) this settlement cannot be avoided by his creditors ; provided the value of the property settled be not grossly out of proportion to the value of the property relinquished by the wife.(*f*) A release by a wife from all claims in respect of past income of property

(*a*) *Teasdale* v. *Braithwaite*, 4 Ch. D. 85, 90 ; *Foster* v. *Lister*, 6 Ch. D. 87 ; *Schreiber* v. *Dinkel*, 54 L. J. Ch. 241.

(*b*) 45 & 46 Vict. c. 75.

(*c*) *Walrond* v. *Walrond*, Johnson, 18.

(*d*) *Vansittart* v. *Vansittart*, 4 K. & J. 63, 70; *Hewison* v. *Negus*, 16 Beav. 594, 598 : *Teasdale* v. *Braithwaite*, 4 Ch. D. 85 ; on appeal, 5 Ch. D. 630 ; *In re Foster* v. *Lister*, 6 Ch. D. 87 ; *Shurmer* v. *Sedgwick*, 24 Ch. D. 597 ; *Arundell* v. *Phipps*, 10 Ves. 148 ; *Bland* v. *Macculoch*, 9 W. R. 65.

(*e*) *Ex parte Home ; In re Home*, 54 L. T. 301 ; *Mackintosh* v. *Pogose* [1895], 1 Ch. 505.

(*f*) See *Dolin* v. *Coltman*, 1 Vernon, 294.

settled to her separate use ;(*g*) or of her jointure ;(*h*) or right of dower ;(*i*) or even a charge by her upon her own estate,(*k*) have all been held to constitute good consideration for a settlement by the husband.

The question of consideration seems to depend upon the answer to the question—Did the wife's concurrence enable the settlement to be made? If it could not have been made without her concurrence, then she gave good consideration for it and it will be supported.

In *Scott* v. *Bell*,(*l*) a *feme covert* joined in an alienation of the lands out of which her jointure issued for the purpose of effectuating a sale for the payment of her husband's debts. On the same day he settled other lands to the same uses as the former settlement. The debts were paid, and some time afterwards the husband mortgaged the lands comprised in the second settlement. It was held that the second settlement must be treated as if it had been made in pursuance of an agreement entered into when the property in the first settlement was aliened, and the jointure destroyed ; and that it was therefore not voluntary. In *Ward* v. *Shallett*,(*m*) a post-nuptial settlement made by a husband in favour of his wife and children, upon the wife agreeing to part with a contingent interest under a bond given by the husband on their marriage, was held good against his

(*g*) *Harman* v. *Richards*, 10 Hare, 81; *Mackintosh* v. *Pogose*, *ante*.

(*h*) *Ball* v. *Burnford*, Pr. Ch. 113.

(*i*) *Jones* v. *Boulter*, 1 Cox, 288.

(*k*) *Lady Arundell* v. *Phillipps*, 10 Ves. 139.

(*l*) 1 Cowper, 286 ; *Cottle* v. *Fripp*, 2 Vernon, 220 ; *Lavender* v. *Blackstone*, 2 Levinz, 146 ; *Blake* v. *French*, 5 Ir. Ch. Rep. 246.

(*m*) 2 Ves. sen. 16 ; *Ramsden* v. *Hylton*, 2 Ves. sen. 308 ; and see *Arundell* v. *Phipps*, 10 Ves. 148.

creditors. In *Carter* v. *Hind*,(*a*) the wife mortgaged her separate property to pay the husband's debts, in consideration of his settling an estate upon her. This settlement was held to be good against his creditors. In *Mackintosh* v. *Pogose*,(*b*) a wife, who was married in 1883, and was then possessed of separate estate, after the marriage allowed that property to pass into her husband's hands, but not as a gift, nor as a loan for the purposes of his trade. The husband having applied part of her property to his own use, settled the residue of it, together with other property of his own, upon trusts not material to be here considered. The wife had no notice of any fraud or fraudulent intention on the part of her husband. This was an action by the husband's trustee in bankruptcy seeking to set aside the deed. It was held that the wife was a purchaser in good faith within section 47 of the Bankruptcy Act, 1883, and the settlement was supported.

And upon the same principle where the husband and wife have mutually agreed to surrender up their existing interests under a settlement, for the purpose of re-settling the property upon themselves and their children; or with a like object have mutually concurred in conveying, or in levying a fine of lands in which they have a joint interest, or in executing a joint power of appointment, the new settlement cannot be deemed to be without consideration, and therefore cannot be avoided by creditors or subsequent purchasers. In *Joyce* v. *Hutton*,(*c*) a term was held in trust for the separate use of a married woman for life, with remainder in trust for

(*a*) 21 L. T. 116; *Clerk* v. *Nettleship*, 2 Levinz, 148.
(*b*) [1895], 1 Ch. 505.
(*c*) 12 Ir. Ch. Rep. 71; reversing 11 Ir. Ch. Rep. 123.

her husband for life, with remainder in trust for their children. The husband and wife agreed to assign their respective interests to trustees upon certain trusts for the benefit of the children. The wife assigned her interest, and the husband covenanted that he would assign his interest also, if he survived the wife and the assignment was required by the trustees. The husband and wife afterwards sold the estate. It was held that the new settlement was not voluntary, but founded on valuable consideration; that, consequently, it was unaffected by the subsequent sale, and specific performance of the husband's covenant might be enforced by the children. In *Hewison* v. *Negus*,(*d*) the wife's estate in fee simple was settled by a post-nuptial settlement upon the wife for her separate use for life, with remainder to the husband for life, with remainder to the children, with ultimate remainder in fee to the wife. It was held that this settlement was good against a subsequent purchaser from the husband and wife, because the modification by the husband of his life estate in possession and by the wife of her inheritance formed a good and valuable consideration.

In *Teasdale* v. *Braithwaite*,(*d*) the wife's real estate had been devised to her when a single woman, with the declaration of a wish that she should settle the same on marriage. This was not done on marriage, but subsequently; after this the husband and wife mortgaged the estate without notice of the settlement, and it was held that the settlement was for valuable consideration and not void as against the mortgagees.

A conveyance by a husband though binding on the

(*d*) 16 Beav. 594. See also *In re Foster* v. *Lister*, 6 Ch. D. 87; *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; affirmed 5 Ch. D. 630.

estate by the curtesy which he would have had in his wife's freehold if there had been issue, in the absence of any conveyance by her, is not sufficient to raise a consideration moving from the husband; or, in other words, as the husband gave up nothing the conveyance was not for value.(*a*)

In *Atkinson* v. *Smith*,(*b*) a husband and wife by feoffment and fine in 1818 mortgaged in fee simple certain lands of which they were tenants by entireties, and by the proviso for redemption the land was to be reconveyed to the husband and wife and their heirs, or to such other persons or person and for such intents and purposes as the husband and wife or the survivor of them, or the heirs or assigns of such survivor, should nominate, direct, or appoint. The mortgage money having been paid, a reconveyance was executed in 1827, by which the mortgagee, by the direction and appointment of the mortgagor and his wife, released, and the husband and wife appointed and released the premises to the use of the wife for life, with remainder to the use of the husband for life, with remainder to uses in favour of their daughter and her children. After the death of the wife, the husband for valuable consideration conveyed the property in fee to the plaintiff, from whom the daughter, when her father died, endeavoured to recover it by an action of ejectment. A suit was instituted in order to restrain the action, and to have the indenture of 1827 delivered up as voluntary, and, therefore, void against the plaintiff as a purchaser for value within 27 Eliz. c. 4. But it was

(*a*) *Shurmur* v. *Sedgwick*; *Crossfield* v. *Shurmur*, 24 Ch. D. 597; *Price* v. *Jenkins*, 5 Ch. D. 619.

(*b*) 3 De G. & J. 186.

held by Lord Chancellor CHELMSFORD (reversing the decision of KINDERSLEY, V.C.), that the terms and provisions contained in the mortgage deed sufficiently indicated an intention to change or modify the wife's estate, for the purpose of enabling her to deal with the equity of redemption without a fine ; and that her concurrence in the settlement made by the reconveyance was a sufficient consideration to sustain the instrument against subsequent purchasers. In *Acraman* v. *Corbett*,(c) by an ante-nuptial settlement the wife's property was settled according to the joint appointment of the husband and wife, and subject thereto to the husband in fee. The wife joined in appointments for the purpose of raising money for the purchase of other property which was settled on her and her husband. It was held that this second settlement was not voluntary. WOOD, V.C., said : "The limitations were to the joint appointment of the husband and wife, and, subject thereto, to the husband in fee. That, undoubtedly, did give to the husband the power of disposing of the whole estate without his wife's consent, because a conveyance by him would prevent any future exercise of the joint power. On the other hand, there was something reserved to the wife, in the right of joining in an appointment, which it might or might not be worth her husband's while to ask her to do. This privilege would have been more important if the old law of dower applied, but it had also some substantial value in its

(c) 1 J. & H. 410 ; and see *Fitzmaurice* v. *Sadleir*, 9 Ir. Eq. Rep. 595 ; *Parker* v. *Carter*, 4 Hare, 409 ; *Whitbread* v. *Smith*, 3 De G. M. & G. 727, 740 ; *Harman* v. *Richards*, 10 Hare, 81 ; *Greene* v. *O'Kearney*, 2 Ir. C. L. Rep. 267 ; *Muskerry* v. *Chinnery*, Ll. & Go. Rep. temp. Sugden, 185, 221.

operation with respect to judgments. The wife may have considered that there might be judgments against her husband, and may have determined to reserve to herself the power of executing a deed by which some portion of the property she had brought her husband might be made available for her against such judgment creditors. In the absence of any actual insolvency at the time, there would certainly be nothing fraudulent in the wife taking this precaution; and even if the husband were insolvent, I doubt whether there would be anything to make an appointment for such a purpose, under a stipulation contained in a marriage settlement, fraudulent within the statute of Elizabeth."

But as a deed, though made for valuable consideration, may be affected by *mala fides*, a settlement which would otherwise have been supported against creditors in consequence of the concurrence of the husband and wife in the transaction may be invalidated, if a fraudulent intent to delay creditors can be proved.(*a*)

In cases where, if the husband were to seek the aid of equity in reaching his wife's property, the Court of Chancery would compel him to make a suitable settlement upon her before rendering him its assistance, the husband may make such settlement as the court would have enforced; and the transaction in such a case cannot be set aside as voluntary, either by creditors or subsequent purchasers.(*b*) But if a woman is indebted before her marriage, she has no equity to a settlement

(*a*) See *Harman* v. *Richards*, 10 Hare, 89; *Butterfield* v. *Heath*, 15 Beav. 408; and see *Foster* v. *Lister*, 6 Ch. D. 87.

(*b*) *Spirett* v. *Willows*, L. R. 1 Ch. 520; *Turnley* v. *Hooper*, 3 Sm. & Giff. 349; *Ash* v. *Lowe*, H. & Jo. 287; *Middlecombe* v. *Marlow*, 2 Atk. 519; *Moor* v. *Rycault*, 2 Atk. 448.

out of her property until her debts incurred before her marriage have been provided for.(*c*) Section 47 of the Bankruptcy Act, 1883, avoids voluntary settlements in the event of bankruptcy ensuing within a certain period after the date of such settlements ; but there is an express exception in favour of any settlement which may be made upon a wife or children of property which has accrued to the husband after marriage in right of his wife.

And a post-nuptial settlement which is a part of an arrangement or bargain, not between the settlor and his wife, but between the settlor and other parties, may also be supported against creditors and subsequent purchasers, if the consideration for the settlement consists of an advance of money to the settlor, of the discharge of his debts, of litigation being suspended, or of any other benefit received by the settlor or of loss incurred in his behalf.(*d*) And here it may be observed that a very slight consideration will be sufficient to support a settlement of real estate against subsequent purchasers, for the courts endeavour as much as possible to diminish the evil produced by construing every voluntary settlement of realty to be fraudulent within the statute 27 Eliz. c. 4. But see now the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).

In *Bayspoole* v. *Collins*,(*e*) A. C. was the owner of a freehold estate, which was worth, beyond a mortgage to which it was subject, about 1,300*l*. In order to induce

(*c*) *Barnard* v. *Ford*, L. R. 4 Ch. App. 247.

(*d*) *Brown* v. *Jones*, 1 Atk. 90 ; *Jones* v. *Marsh* Cases temp. Talbot, 64 ; *Colvile* v. *Parker*, Cro. Jac. 158 ; *Ramsden* v. *Hylton*, 2 Ves. sen. 308 ; *Wheeler* v. *Caryl*, Ambler, 121 ; *Holmes* v. *Penney*, 3 K. & J. 90 ; *Scott* v. *Scott*, 4 H. L. C. 1065.

(*e*) L. R. 6 Ch. 228.

him to make a post-nuptial settlement of this estate on his wife and children, one of his wife's relations agreed to advance him 150*l.* on his promissory note to meet the interest on the mortgage, which was then in arrear. It was held that the loan was a sufficient consideration to support the settlement against subsequent purchasers and mortgagees. Where a person incurred expenses upon the faith of a settlement under which he took a benefit, and in addition he entered into covenants to indemnify the settlor against certain incumbrances, it was held to be a good consideration for the settlement.(*a*) In *Thompson* v. *Webster*,(*b*) a man who owed money applied to his mother for advances to pay his debts. She declined to assist him, unless he would settle his property upon his wife and children. After some delay he acceded to this and made the required settlement, by which he reserved a life interest, valued at 1,700*l.*, to himself. The mother discharged his debts, except a sum of 300*l.*, which had been concealed from her. The son then became insolvent, and died, leaving the debt of 300*l.* unpaid. In a suit by the assignee in insolvency to set aside the settlement as fraudulent, it was held that, as the settlor could procure his mother's assistance only upon the terms of making the settlement, it could not be looked upon as his own spontaneous act and voluntary, and that it was therefore not executed with intent to defraud creditors. In *In re Johnson*, *Golden* v. *Gillam*,(*c*) J., by deed of gift, granted his

(*a*) *Townend* v. *Toker*, L. R. 1 Ch. 446.

(*b*) 4 Drew. 628 ; *In re Tetlay* [1896], W. N. 86 (2) ; *Wrixon* v. *Cotter*, 1 Ridgw. P. C. 295, 305 ; *Townend* v. *Toker*, L. R. 1 Ch. 446 ; *Hadley* v. *Caswell*, 15 L. T. (N.S.) 516 ; see *Slack* v. *Tolson*, 1 Russ. 553 ; *Godfrey* v. *Poole*, 13 App. Cas. 497.

(*c*) 20 Ch. D. 389.

farming property, which was virtually all he had, in trust for his daughters, they covenanting to pay the debts incurred by J. in working the farm up to that date, and also thenceforth to maintain J. The plaintiff's debt was not incurred by J. in working the farm, and was defeated by the deed. The court found that the deed was an honestly intended family arrangement, and was not executed with the object of defeating creditors, and was, therefore, valid, In *Ford* v. *Stuart*,(*d*) A. B. mortgaged his own estate for the benefit of C. D., who (pursuant to an agreement to that effect with A. B.) conveyed real estate not only as an indemnity to A. B., but also to uses for the benefit of his (C. D.'s) own children and their issue. It was held that there was a sufficient valuable consideration as between A. B. and C. D. to support the limitations to C. D.'s children as against subsequent purchasers for valuable consideration from C. D. Under 27 Eliz. very small consideration was sufficient to remove a *bonâ fide* settlement from the category of voluntary settlements ; far less than would be sufficient to support a settlement made by an insolvent as against his creditors.(*e*)

Thus in *Price* v. *Jenkins*(*e*) it was held that a settlement of leasehold property was not a voluntary conveyance under the statute, because the assignment of leasehold property, to which liability to pay rent and perform covenants is attached is in itself a conveyance for valuable consideration, for the beneficiaries took upon themselves the duty to discharge those liabilities. It is doubtful

(*d*) 15 Beav. 493 ; and see *Bayspoole* v. *Collins*. 6 L. R. Ch. 228

(*e*) *Price* v. *Jenkins*, 5 Ch. D. 619 ; *Ex parte Ridler*, 22 Ch. D. 74 ; *Rosher* v. *Williams*, 20 Eq. 210 ; *Ex parte Hillman*, 10 Ch. D 622 ; but see *Harris* v. *Tubbs*, 42 Ch. D. 79.

if the House of Lords would approve of this decision. It has, however, been decided that the decision in *Price* v. *Jenkins* has no application where leaseholds are settled by way of sub-demise.(*a*)

In *Heap* v. *Tonge*,(*b*) an agreement was entered into between an heiress-at-law and a devisee, in order to prevent litigation about a disputed will. It was agreed that the property comprised in the will should be vested in trustees for the benefit of the heiress-at-law, her husband and children, and the said devisee. The heiress-at-law and her husband afterwards mortgaged the property; but it was held, at the suit of the devisee and one of the children, that the assignment to the trustees could not be avoided by a subsequent sale, inasmuch as it was not voluntary but founded upon valuable consideration, the contracting parties being purchasers of each other's interests. On the other hand, a covenant by a grantee under a voluntary deed to build a house on the property conveyed to him is not a sufficient consideration; and specific performance of a contract for sale made by the settlor after the date of the settlement was decreed by the court.(*c*)

A post-nuptial settlement, though for valuable consideration and so, good as between husband and wife, is, however, voluntary as regards the then existing or future children of the husband and wife.(*d*)

(*a*) *Shurmer* v. *Sedgwick*, 24 Ch. D. 597; 31 W. R. 884.

(*b*) 9 Hare, 104; *Williams* v. *Williams*, L. R. 2 Ch. App. 294; *Holmes* v. *Penney*, 3 K. & J. 90; and see *Penhall* v. *Elwin*, 1 Sm. & Giff. 258, 270; *In re Johnson*, 20 Ch. D. 389.

(*c*) *Rosher* v. *Williams*, 20 Eq. 210.

(*d*) *Green* v. *Paterson*, 32 Ch. D. 95; *Morgan* v. *Chetwynd*, 31 Ch. D. 596.

It may here be observed, that where a compromise of a doubtful claim is entered into deliberately and without fraud, the courts will not inquire into the sufficiency of the consideration which passed between the parties.(*e*) And where a doubtful question has been once amicably settled by private arrangement, the matter will not be affected by a subsequent decision of the courts on the matters in dispute.(*f*)

It has been already shown that re-settlements between father tenant for life and son tenant in tail may generally be supported against creditors and subsequent purchasers, on the ground that, as the agreement could not have been carried out without the concurrence of both parties, each must be supposed to have stipulated for the estates limited to himself and his relations, and to have threatened to withdraw from the matter altogether unless his proposals were acceded to.(*g*)

Of course these re-settlements between father and son may be avoided if an intent to defraud creditors plainly appears. In *Tarleton* v. *Liddell*,(*h*) the father was tenant for life, and the son tenant in tail. The father fraudulently procured the son to join in a recovery

(*e*) *Naylor* v. *Winch*, 2 S. & S. 555 ; *Houghton* v. *Lees*, 1 Jur. (N.S.) 862 ; *Gordon* v. *Gordon*, 3 Swans. 463 ; *Malone* v. *Malone*, 8 Cl. & F. 179 ; *Cook* v. *Wright*, 1 B. & S. 559 ; *Stapilton* v. *Stapilton*, 1 Atk. 2 ; *Mills* v. *New Zealand Alford Estate Company*, 32 Ch. D. 266.

(*f*) *Lawton* v. *Campion*, 18 Beav. 87 ; *Ex parte Lucy*, 17 Jur. 1143 ; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449 ; *Brooke* v. *Lord Mostyn*, 2 De G. J. & S. 273, and see p. 416 ; but see *Ex parte Banner*, 17 Ch. D. 480.

(*g*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 92 ; *Wakefield* v. *Gibbon*, 1 Giff. 401.

(*h*) 17 Q. B. 390 ; *Baverstock* v. *Rolfe*, 8 A. & E. 650 ; *Clement* v. *Eccles*, 11 Ir. Eq. Rep. 229.

for the purpose of defeating the father's creditors; but the son was not privy to the fraud. It was held that, although the recovery was good, the uses declared upon it were void against the father's creditors, who therefore took his life estate for the payment of their debts.

Settlements in the nature of family arrangements have been supported where they were *bonâ fide*, and there was some consideration.(*a*)

Concerning Substituted Bonds.

As the obligee of a voluntary bond may enforce payment of it by a process of law, the surrender up of the instrument to the obligor will constitute a valuable consideration for another bond substituted in lieu of the first. The second bond, therefore, not being voluntary, will be sustained against creditors, unless some special circumstances of fraud be shown.(*b*) Upon the same principle a bond given to secure arrears which have accrued due on a voluntary bond cannot be treated as without consideration.(*c*)

(*a*) *Greenwood* v. *Greenwood*, 2 D. J. & S. 28; *Penhall* v. *Elwin*, 1 Sim. & Giff. 269; *Tennent* v. *Tennents*, L. R. 2 H. L. Sc. 6; *Re Johnson*, 20 Ch. D. 389, cited, *ante*.

(*b*) *Ex parte Berry*, 19 Ves. 218.

(*c*) *Gilham* v. *Locke*, 9 Ves. 612; *Stiles* v. *Attorney-General*, 2 Atk. 152; *Meggison* v. *Foster*, 2 Y. & C. C. C. 336; *Nixon* v. *Hamilton*, 1 Ir. Eq. Rep. 46, 49; *Ex parte Hookins*, 13 Jur. 114; *Barnes* v. *Hedley*, 2 Taunt. 184.

CHAPTER VI.

Concerning Voluntary Settlements which are made good against Creditors and subsequent Purchasers by matters arising Ex post facto.

A CONVEYANCE though voluntary upon the face of it and at first void, as against a purchaser for valuable consideration, may yet become valid by force of subsequent events.(*d*) The principle appears to be that the deed is only voidable not absolutely void, and, therefore, if before it is attached, anything is done or suffered, on the faith of, or in consequence of the voluntary deed, this may constitute good consideration *ex post facto* and make the deed no longer voluntary.

There appears to be no difference between a voluntary settlement made good by a subsequent marriage, and one made good by a subsequent advance of money.(*e*)

A voluntary settlement cannot be avoided by the settlor's creditors nor by subsequent purchasers from him if the voluntary grantee has parted with the estate to a *bonâ fide* purchaser for valuable consideration, or has settled the estate upon his marriage. Thus it is said in *Prodgers* v. *Langham*,(*f*) if A. makes a fraudulent

(*d*) *Clarke* v. *Willott*, L. R. 7 Ex. 313 ; *Prodgers* v. *Langham*, 1 Siderfin, 134.

(*e*) 9 Ves. 190.

(*f*) 1 Siderfin, 134 ; followed in *Clarke* v. *Willott*, *ante*, and see *Guardian Assurance Company* v. *Viscount Avonmore*, L. R. Ir. 6 Eq. 391 ; *Gibson* v. *Bruce*, 5 M. & Gr. 399 ; *Stevenson* v. *Newham*, 13 C. B. 285, 303, *per* PARKE, B. ; *Huguenin* v. *Baseley*, 14 Ves.

feoffment to B., and B. enfeoffs C. for valuable consideration, and then A. enfeoffs some one else for valuable consideration, C. shall prevail over the second feoffee of A. In *George* v. *Milbanke*,(*a*) a father and son limited an estate to trustees for a term of 3,000 years, upon trust after the father's death to raise the sum of 5,000*l.* for such persons as the father should by deed or will appoint, and in default of appointment the same to go to the father's executors and administrators. The father by deed directed and appointed that the sum of 500*l.*, part of the sum of 5,000*l.*, should after his decease be raised for the benefit of a natural son, who assigned the sum thus charged on the estate to a mortgagee to secure an advance. Upon a bill filed by the administrator of the father to have the whole of the sum of 5,000*l.* raised out of the estate for the payment of debts; it was held that, although the son being a volunteer would have been postponed to his father's general creditors, nevertheless, the mortgagee had a right to be paid in preference to them, inasmuch as he stood in the position of a creditor for value against the father's estate, and moreover had a specific charge on the property. In the case of *Halifax Joint Stock Bank* v. *Gledhill*,(*b*) a reversionary life interest was reserved to a settlor by

273; *Brown* v. *Carter*, 5 Ves. 862, 878; *Hoghton* v. *Hoghton*, 15 Beav. 278, 316; *Harris* v. *Tremenheere*, 15 Ves. 34; *Roddy* v. *Williams*, 3 Jo. & Lat. 1; *Doe* v. *Routledge*, Cowper, 705.

(*a*) 9 Ves. 190; *Andrew Newport's Case*, Skinner, 423; *Wilson* v. *Wormald*, Godbolt, 161, pl. 226; *Doe* v. *Martyr*, 1 B. & P. N. R. 332; *Parr* v. *Eliason*, 1 East, 92; *Lady Burg's Case*, Moore, 602; *Ashley* v. *Ashley*, 3 Simon, 149; *Aldborough* v. *Trye*, 7 C. & F. 436, 463; *Talbot* v. *Staniforth*, 1 J. & H. 484; *Tottenham* v. *Green*, 32 L. J. Ch. 201; *Payne* v. *Mortimer*, 28 L. J. Ch. 716; *Judd* v. *Green*, 33 L. T. 597.

(*b*) (1891), 1 Ch. 31.

a settlement void as against creditors under 13 Eliz. c. 5; the settlor subsequently charged his interest by way of equitable mortgage to a person who advanced his money without notice that the settlement was fraudulent, and it was held that section 5 protected a subsequent purchaser (without notice) of any interest under the settlement, whether the interest was legal or equitable, and the deed impeached was not void against the purchaser though it was against other persons. In *Morewood* v. *South Yorkshire and River Dun Railway Company*,(*c*) one Watson by bill of sale registered under 17 & 18 Vict. c. 36, assigned goods to Morewood, who, in the presence of Watson, assigned them to Bayne by way of mortgage to secure a *bonâ fide* advance of money made by Bayne to himself. An action was pending against Watson when he assigned the goods to Morewood, and there was evidence to show that the assignment by him was fraudulent; but it was held that the sheriff could not seize the goods in the hands of Bayne under a *fi. fa.* in the action against Watson.

But if the purchase from or other transaction with the voluntary grantee be not *bonâ fide* and founded on valuable consideration, the voluntary settlement cannot

(*c*) 3 H. & N. 798; see *Richards* v. *Johnston*, 4 H. & N. 660, which shows that an execution creditor is not bound by an estoppel which might have prevented the debtor himself from claiming the goods taken under the execution; so that if Watson, in the above-cited case, had not actually assigned the goods to Morewood, but had merely stood by and allowed Morewood to represent himself as the owner of the goods, and to mortgage them to Bayne, the sheriff might nevertheless have seized the goods in the hands of Bayne under the *fi. fa.*, which had been issued in the action against Watson. And see *Low* v. *M'Gill*, 12 W. R. 826.

be supported against the settlor's creditors or against subsequent purchasers from him. In *O'Connor* v. *Bernard*,(*a*) a person who was greatly indebted, by a voluntary deed conveyed real estate to his daughter with the view of putting the property out of the reach of his creditors. The daughter sold the estate to the defendant, who had full notice of the circumstances under which the voluntary deed was executed. It was held that the conveyance to the daughter was fraudulent and void against the father's creditors, and that the defendant could stand in no better position than his vendor.

The voluntary settlor will not be able to defeat the settlement if he has allowed the voluntary grantee to expend money on the estate ; or if he has induced other persons to contract or deal with the voluntary grantee on the faith of the latter being the absolute owner of the property. In *Dillwyn* v. *Llewellwyn*,(*b*) a father devised his real estate to trustees to the use of his wife for life, with remainder to his son for life, with remainders over. The father afterwards gave the H. estate to the son, and signed a memorandum as follows :—" H., together with my other freehold estates, are left in my will to my dearly beloved wife ; but it is her wish, and I hereby join in presenting the same to our son, for the purpose of furnishing him with a dwelling-house." The son took possession of the estate, and with the approbation of his father expended 14,000*l.* in the erection of a dwelling-house. Upon the death of the father, it was held that the expenditure by the son with

(*a*) 2 Jones, 654.

(*b*) 4 De G. F. & J. 517; and see *In re Barker's Estate*, 44 L. J. (N.S.) Ch. 490.

his father's consent supplied a valuable consideration to the memorandum which was originally wanting, and that therefore the son was entitled to have a conveyance to himself of the fee simple of the H. estate. In *Kirk* v. *Clark*,(c) Sir Nicholas Clark, being tenant for life of copyhold lands, with remainder to his wife for life, with reversion to himself in fee, made a surrender of the reversion to his eldest son in tail, with remainder to his own right heirs; which surrender was made to his son with intent only to lessen the fine he would have had to pay in case the reversion had come to him by descent from his father; he having it by this surrender as a purchase. Afterwards, upon the son's marriage, the lady's friends proposed to have these copyhold lands settled, together with some leaseholds; but the father said he had already settled the copyholds by the surrender. Thereupon the leaseholds only were settled. Afterwards, the wife of Sir Nicholas dying, he attempted to settle the copyholds on his second marriage, and to defeat the arrangement made upon the son's marriage. But it was held that as the son's marriage took place on the faith of his having an estate tail in the copyhold lands, the surrender to him by the father, which was at first voluntary, became supported by valuable consideration, and could not be defeated by a subsequent disposition or sale.

In a contention arising under the statute 27 Eliz. c. 4, between a purchaser for valuable consideration from a voluntary grantee, and a purchaser for value

(c) Pr. Ch. 275; *Prodgers* v. *Langham*, 1 Siderfin, 133, followed in *Clarke* v. *Willott*, L. R. 7 Ex. 313, and see *East India Company* v. *Clavell*, Pr. Ch. 377, cited in *Payne* v. *Mortimer*, 4 De G. & J. 447, 455; *Tarleton* v. *Liddell*, 17 Q. B. 421.

from the voluntary grantor, he whose purchase was prior in point of time will prevail. In *O'Donovan* v. *Rogers*,(*a*) a father made a voluntary settlement on his daughters. Subsequently he parted with the property comprised in the voluntary settlement to a purchaser for valuable consideration. Afterwards the voluntary grantees married, and their property (including the settled property) was conveyed to trustees upon the trusts of their respective marriage settlements. It was contended that the voluntary settlement, having been made good by matter *ex post facto*, had priority by relation over the purchase from the settlor ; but this argument was overruled.

A conveyance for valuable consideration cannot be defeated by a subsequent conveyance for value of the same property, merely because the consideration for the first conveyance has, since the execution of such conveyance, failed by matter *ex post facto*.(*b*)

(*a*) 7 Ir. Ch. Rep. 1 ; *Goodright* v. *Moses*, 2 W. Bl. 1019 ; but see *In re Foster and Lister*, 6 Ch. D. 87 ; *Scott* v. *Scott*, 4 H. L. 1065.

(*b*) *Paget* v. *Paget*, 9 L. R. Ir. 128, 142 ; *Tarleton* v. *Liddell*, 7 Q. B. 414, 421.

CHAPTER VII.

As to how far Separation Deeds may be supported against Creditors and subsequent Purchasers.

It has been shown in a preceding part of this work that a post-nuptial settlement which is not supported by valuable consideration will be void against the settlor's creditors if it can be shown that the settlor's intention was to hinder or delay them. In like manner a settlement made upon a separation between a husband and wife will be void against the settlor's creditors if the transaction is not supported by some valuable consideration.

A covenant in a separation deed on the part of the wife's trustees to indemnify the husband against all debts which the wife may contract during the separation is a good consideration to support the covenants entered into and other provision made by the husband for the benefit of the wife; and so is a covenant by the wife's trustees to pay an annuity to the husband, or to discharge the debts owing by him at the time of the separation.(*c*) And where a husband, upon a separation from his wife, releases his marital right in her future-acquired property, this is a good consideration for an annuity granted to him by the wife out of her separate estate.(*d*)

(*c*) *Wilson* v. *Wilson*, 1 H. L. 538; 5 H. L. 40; and see *Jones* v. *Waite*, 7 C. & F. 101.

(*d*) *Logan* v. *Birkett*, 1 M. & K. 220.

In *Worral* v. *Jacob*,(*a*) G. W., being entitled to a contingent reversionary interest in fee in certain real estate, upon a separation from his wife, covenanted with her trustee to pay her 70*l.* per annum during the separation, and to convey the real estate as she should by deed or will appoint. The trustee covenanted to indemnify the husband from all debts and engagements the wife might contract during the separation, and from all claim for alimony. The wife appointed the estate in favour of the plaintiffs. G. W. became bankrupt and died; thereupon a question arose between the plaintiffs and the assignees in bankruptcy of G. W., as to whether the before-mentioned deed executed by him could be supported against his creditors. GRANT, M.R., held that the covenant by the trustee to indemnify the husband was a sufficient consideration to support the deed, and, in giving judgment, he said: "It is contended that an indemnity against the wife's debts is an indemnity against nothing, as the husband living apart from his wife and allowing her a separate maintenance is not liable to pay her debts. That, however, is too largely stated, for questions frequently arise as to the husband's liability, notwithstanding a separate maintenance is provided for the wife. The sufficiency of the maintenance, according to the condition and fortune of the parties, is held to be a question for the consideration of the jury. This covenant may, therefore, afford a most important protection to the husband, and throw a

(*a*) 3 Mer. 256; and see also *Stephens* v. *Olive*, 2 Bro. C. C. 90; *King* v. *Brewer*, 2 Bro. C. C. 93 *n*; *Compton* v. *Collinson*, 2 Bro. C. C. 377, 386; *St. John* v. *St. John*, 11 Vesey. 525; *Logan* v. *Birkett*, 1 M. & K. 220; *Wellesley* v. *Wellesley*, 10 Sim. 256; *Gibbs* v. *Harding*, L. R. 5 Ch. 336.

burdensome obligation on the trustee." So, where a separation deed contained a covenant on the part of the wife's trustees that the wife should provide for, support, and educate the children of the marriage, and that she should not sue the husband for alimony or other provision, it was held to be made for valuable consideration and not to be voluntary.(*b*) In *Cowx* v. *Foster*(*c*) the deed contained no covenant by the trustees to indemnify the husband against the wife's debts, but only a covenant by them that the husband should be at liberty to reimburse himself in respect of his wife's debts out of an annuity charged by the same deed upon the husband's real estate for the benefit of the wife. It was held that the gift of the annuity was without consideration, and, therefore, void against a subsequent mortgage made by the husband, inasmuch as the covenant by the trustees gave him nothing which he had not before, but merely conferred on him a right to keep back a certain sum out of the voluntary gift which he had made.

In cases where the husband has behaved in such a way towards his wife as to entitle her to claim a separation and alimony in the Divorce Court, he may, in order to avoid the consequences of a suit, execute a deed arranging the terms of a separation between the wife and himself, and making provision for the maintenance of her and the children. Such a deed cannot be set aside by the husband's creditors on the ground that it is voluntary, and not founded on valuable consideration.(*d*)

(*b*) *Nixon* v. *Hamilton*, 2 Dr. & Wal. 364.

(*c*) 1 J. & H. 30, see p. 36; and see also *Clough* v. *Lambert*, 10 Sim. 174; *Fitzer* v. *Fitzer*, 2 Atk. 511; *Walrond* v. *Walrond*, 1 Johns. 18.

(*d*) 2 Roper, H. & W. 289.

In *Hobbs* v. *Hull*(*a*) the husband was indebted to the plaintiffs on judgments and otherwise. Upon a separation between him and his wife, he settled a portion of his real estate upon her and their children. The plaintiffs endeavoured to avoid the settlement as fraudulent against them within 13 Eliz. c. 5. The defence was that the husband had before the time of the separation lived in a state of adultery, and behaved in such a way as to entitle the wife to a divorce *à mensâ et thoro*, and to an allowance; and that this provision was in lieu of such allowance and to prevent litigation. It was held that the settlement was founded on good consideration, and not void against the husband's creditors. The Master of the Rolls said: "I have to decide the question, whether the husband having behaved so ill as to entitle the wife to obtain a divorce in the Spiritual Court *à mensâ et thoro*, and to have a proper allowance from him, if the wife, instead of strictly prosecuting that right, meets the husband in the threshold, and says she will accept the maintenance proposed by him without litigation, whether this can be said to be such a voluntary act as to be fraudulent against creditors. Surely this settlement can never be said to be without consideration. A husband and wife may certainly in particular situations treat together effectually, if they treat upon fair and reasonable terms. When the wife in this case agrees to accept this settlement instead of resorting to the enforcing her rights in the Ecclesiastical Court, surely she is giving up something for it. I am, therefore, very clearly of opinion that this is not one of those agreements which the statute of Elizabeth meant to

(*a*) 1 Cox, Eq. C. 445; *Nunn* v. *Wilsmore*, 8 T. R. 521; *Fitzer* v. *Fitzer*, 2 Atk. 511.

prevent. I do not go upon any motives of compassion when I decree as I am now about to do, nor upon the conduct of the parties, but upon the rights in law which I take to exist between them."

A compromise of a suit in the Divorce Court is sufficient to support a separation deed against creditors ;(*b*) and so is an agreement by a wife to withdraw an indictment against her husband for an assault or other injury, not being a felony.(*c*)

(*b*) *Wilson* v. *Wilson*, 1 H. L. 538 ; 5 H. L. 40 ; *Vansittart* v. *Vansittart*, 4 K. & J. 63, considered in *Hamilton* v. *Hector*, L. R. 13 Eq. 511 ; *Jodrell* v. *Jodrell*, 9 Beav. 45 ; 2 Bright on H. & W. 326.

(*c*) *Elworthy* v. *Bird*, 2 S. & St. 372 ; *Garth* v. *Earnshaw*, 3 Y. & C. 584.

CHAPTER VIII.

As to how far Voluntary Appointments are Good against Creditors.

THE principles which have been before considered with respect to voluntary assignments in fraud of creditors by persons in embarrassed circumstances may be applied to voluntary appointments, which have the effect of disappointing and delaying creditors, and the exercise of a general power of appointment by deed or will over real or personal estate may thus be fraudulent and void as against creditors.

Therefore, where a man who is indebted has vested in him a power of appointment and also an interest in default of appointment, he cannot by a voluntary instrument execute the power in such a way as to prevent his creditors from reaching the property over which the appointment is exercised.

In *Whittington* v. *Jennings*,(*a*) certain mine shares were assigned to trustees in trust for one Tice for life, and after his decease for his wife for life, and after the decease of the survivor, in trust to raise 760*l*., and pay the same to such persons as Tice should by deed or will appoint, and in default of appointment to his executors. Tice's wife died, and he, being at the time indebted to the plaintiff on the balance of a running account, made a voluntary appointment of the above-mentioned sum

(*a*) 6 Simon, 493 ; *White* v. *Sansom*, 3 Atk. 410.

in favour of the defendants. Subsequently the trustees, at Tice's request, assigned the trust property to the plaintiff in trust for Tice, who by his will appointed the plaintiff his executor. After Tice's death the defendants claimed to have the 760*l.* raised and paid to them; but, upon a bill filed by the plaintiff to have the appointment declared fraudulent and void, the court ordered it to be set aside, and held that the plaintiff was entitled to the aforesaid sum as part of his testator's assets.

If the power was originally exercised for valuable consideration, or if the property comprised in a voluntary appointment has been sold by the appointee to a *bonâ fide* purchaser, the appointment cannot be disturbed by the appointor's creditors.(*b*)

Where trustees had advanced to the tenant for life a large portion of the trust fund during her life, and she acting under a general power of appointment, appointed the funds to the trustees in trust to indemnify themselves and subject thereto for beneficiaries, she having died insolvent, it was held that creditors could not compel the trustees to replace the trust fund; because the creditors could only get at the property subject to the power, through the act of appointment, so they could not take it against the other acts of the appointor.(*c*)

And if a man has a general power of appointment over a fund by will, and actually exercises the power, the appointed property will in equity form part of his

(*b*) *George* v. *Milbanke*, 9 Ves. 191; *Payne* v. *Mortimer*, 28 L. J. Ch. 716; *Hart* v. *Middlehurst*, 3 Atk. 377; *Martyn* v. *M'Namara*, 4 Dr. & War. 411; *Cutten* v. *Sanger*, 2 Y. & J. 459.

(*c*) *Re Newnham's Estate; Amoore* v. *Elmslie* (1881), W. N., p. 69.

assets for the payment of his debts.(*a*) The same principle applies where the power is exercised over real estates; for the statute of Fraudulent Devises(*b*) expressly refers to lands, &c., which a person has power to dispose of by will, and it has been held that a power of appointment is an "estate or interest in land" within the meaning ef the statute 3 & 4 Will. 4, c. 104, which makes real estate assets for the payment of simple contract debts.(*c*) An appointment by deed which is to take effect on the death of the appointor stands on the same footing as a will for the purpose of the rule under discussion, and, therefore, the property over which the power is exercised will form part of the appointor's assets.(*d*) It is to be observed, however, that appointed property, whether real or personal, will not be applicable towards the discharge of the appointor's debts until the whole of his own property of every kind has been exhausted.(*e*)

Where the person executing a general power of appointment by will is a married woman, the appointed property is not part of her separate estate so as to be liable for the payment of her debts, unless such debts have been contracted by fraud.(*f*)

(*a*) *Holmes* v. *Coghill*, 7 Ves. 499; 12 Ves. 206; *Edie* v. *Babington*, 3 Ir. Ch. Rep. 568; *Petre* v. *Petre*, 14 Beav. 197; *Williams* v. *Somers*, 16 Beav. 1.

(*b*) 3 & 4 Will. & M. c. 14, repealed and re-enacted by 11 Geo. 4 & 1 Will. 4, c. 47.

(*c*) *Fleming* v. *Buchanan*, 3 De G. M. & G. 976.

(*d*) *Lord Townshend* v. *Windham*, 2 Ves. sen. 1; *Pack* v. *Bathurst*, 3 Atk. 269.

(*e*) *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; see *Vaughan* v. *Vanderstegen*, 2 Drew. p. 382.

(*f*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 289, 363, 408; *Blachford* v. *Woolley*, 2 Dr. & Sm. 204; *Shattock* v. *Shattock*, L. R.

It is not proposed to discuss the question as to how far appointments by married women make the property appointed assets for payment of their debts ; the reader is referred to Mr. Farwell's work on "Powers."(*g*)

But now under the Married Women's Property Act, 1882, by section 4, and section1, sub-sections 2, 3, and 4 ; a married moman will be affected by the above-mentioned rules just as if she was a *feme sole.*

Property appointed by will is assets for the payment of those creditors only whose debts are recoverable at the time of the testator's death. In *Jenney* v. *Andrews,*(*h*) a man by his marriage settlement had power to appoint a sum of money in the stocks by will only. He exercised the power in favour of his wife. Shortly afterwards he was adjudicated a bankrupt, and obtained his certificate. After his death the assignees in bankruptcy claimed the appointed property, but it was held that the appointee was not liable for the payment of any of the testator's debts which did not exist a the time of his death, and that therefore the claim of the assignees was barred by the certificate.

Grants and dispositions of land in which there is *reserved* any power of revocation at the will of the grantor are expressly made void against subsequent purchasers by the statute 27 Eliz. c. 4.(*i*) There is no similar provision in the statute 13 Eliz. c. 5 ; but a

2 Eq. 182 ; *Johnson* v. *Gallagher,* 3 De G. F. & J. 494 ; *Hoare* v. *Osborne,* 10 Jur. (N.S.) 694 ; *London Chartered Bank of Australia,* L. R. 4 P. C. 572.

(*g*) 2nd Edit., pp. 255 to 265.

(*h*) 6 Madd. 264 ; *Re Vizard's Trusts,* L. R. 1 Ch. 558 ; *Duke of Marlborough* v. *Godolphin,* 2 Ves. sen. 61 ; *De Serra* v. *Clarke* L. R. 18 Eq. 587 ; *Sweetapple* v. *Horlock,* 11 Ch. D. 745.

(*i*) See Chapter XXV.

settlement with a clause empowering the settlor to revoke or alter it at his pleasure appears to be clearly within the evil proposed to be remedied by the Act. For such a *reservation* of dominion over the property comprised in the settlement is *primâ facie* evidence of an intention on the part of the settlor to defraud his creditors by placing his property out of their reach, while he all the time retains to himself full disposition over it.(*a*) There appears to be no doubt, therefore, that settlements and other assurances of property which the settlor or grantor can revoke at pleasure may be avoided by creditors.(*b*) In *Tarback* v. *Marbury*,(*c*) a settlement which reserved a power to the settlor to mortgage or charge to any extent was held to be void against creditors by statute and judgment.

Actual notice of such a power to revoke, given to a man before he becomes a creditor, will prevent him from objecting to such a revocation.(*d*) And a power to revoke for a particular purpose may not make such a deed void.(*e*)

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44 and 56, sub-sect. 4, the trustee of the bankrupt's estate may exercise all powers over property which the

(*a*) See *Peacock* v. *Monk*, 1 Ves. sen. 132, *per* Lord HARDWICKE; *Myers* v. *Duke of Leinster*, 7 Ir. Eq. Rep. 146; *Smith* v. *Fellows*, 2 Atk. 62; and see *Maddison* v. *Andrew*, 1 Ves. 61; *Alton* v. *Harrison*, L. R. 4 Ch. 626.

(*b*) See *Columbine* v. *Penhall*, 1 Sm. & Giff. 228; *Smith* v. *Hurst*, 10 Hare. 30.

(*c*) 2 Vernon, 510; see *Smith* v. *Fellows*, 2 Atk. 62, 377; *Hungerford* v. *Erle*, 2 Freeman, 120.

(*d*) *Sagitary* v. *Hide*, 2 Ver. 44.

(*e*) *Hungerford* v. *Erle*, 2 Freeman, 120.

bankrupt might have exercised for his own benefit(*f*) at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice. And the Crown has power by virtue of its prerogative to extend lands over which the king's debtor has a power of revocation for his own benefit, whatever may be the formalities required for the execution of the power, and although the donee may have died without executing it.

(*f*) *Cooper* v. *Slight*, 27 Ch. D. 565 ; *Re Bedingfeld and Herring's Contract* (1893), 2 Ch. 332.

CHAPTER IX.

As to how far Transfers of Property without Transmutation of Possession are good against Creditors.

VARIOUS circumstances indicating an intention on the part of the settlor of goods and chattels to hinder and delay his creditors are enumerated by Lord COKE in his report of *Twyne's Case* :(*a*)—(1st.) The gift there was general, without any exception, of the debtor's wearing apparel or anything of necessity ; and it is commonly said *quod dolosus versatur in generalibus.* (2ndly.) The debtor continued in possession and used the goods as his own, and by reason thereof he traded and trafficked with others, and defrauded and deceived them. (3rdly.) The gift was made in secret, *et dona clandestina sunt semper suspiciosa.* (4thly.) The gift was made pending a writ. (5thly.) There was a trust between the parties ; for the donor possessed all and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud. (6thly.) The deed contained a statement that the gift was made honestly, truly, and *bonâ fide ; et clausulæ inconsuetæ semper inducunt suspicionem.*

Various other *indicia* of fraud might be mentioned,(*b*) but those just alluded to will suffice to show the nature

(*a*) 3 Coke, Rep. 80, and see *Ex parte Wilson,* 22 W. R. 241.

(*b*) *Dewey* v. *Bayntun,* 6 East, 257 ; *Arundell* v. *Phipps,* 10 Ves. 139. To ante-date a deed for the purpose of defrauding creditors is a forgery, although the instrument is in fact made

of the deceit sought to be remedied by the statute 13 Eliz. c. 5.

In this chapter it is proposed to consider those cases where an assignment of property has been treated as fraudulent against creditors by reason of the seller continuing in possession after the sale. The subject of reputed ownership under the bankruptcy laws will be reserved for a separate discussion (Chapter X.).

The Bills of Sale Acts were passed in order to prevent frauds upon creditors by secret bills of sale of personal chattels.

The remarks made in this chapter relate exclusively to transfers of personal property, such as goods and chattels, the ownership of which is usually evidenced by possession. As the ownership of real property and chattels real depends on the title shown by the deeds relating to the estate, and not upon possession, no presumption of fraud can arise from the circumstance that the property has not changed hands after the sale.

Where a man who is indebted makes an absolute assignment of his goods and chattels to another person, whether that person be a creditor or not,(*c*) and no change of possession takes place, but the debtor is allowed to retain his property as before, a presumption arises that there is some secret understanding or trust between the debtor and his assignee, by which the former, although he remains in the enjoyment of his property, is nevertheless to be protected from the exe-

and executed by the parties by whom it purports to be made and executed. *The Queen* v. *Ritson*, 1 L. R. C. C. R. 200.

(*c*) *Meggot* v. *Mills*, 1 Ld. Raym. 286 ; *Kidd* v. *Rawlinson*, 2 Bos. & Pul. 59 ; *Martindale* v. *Booth*, 3 B. & Ad. 504 ; *Nunn* v. *Wilsmore*, 8 T. R. 521.

cution of his creditors; thus delaying them, and defrauding them of their just demands. Upon the same principle it is evidence of fraud if an execution creditor, after having seized the goods of his debtor, allows him to remain in the possession and enjoyment of them.(*a*) Unless the presumption of fraud which arises in such cases is rebutted, any other person suing out execution against the debtor may seize the goods in his hands, and will be allowed to retain them against the fraudulent assignee or creditor.(*b*)

In the case of *Edwards* v. *Harben*,(*c*) it was laid down that, where an assignment is intended to have immediate operation, possession must accompany and follow the deed, or the transaction is fraudulent, *in point of law*. This doctrine, however, has been repudiated in subsequent cases, and the circumstance that the possession of the assignor is inconsistent with the deed is now treated as merely *primâ facie* evidence of fraud, to be left, with all the other circumstances of the case, to the consideration of the jury.(*d*) In *Twyne's*

(*a*) *Graham* v. *Furber*, 14 C. B. 410; *Edwards* v. *Harben*, 2 T. R. 587; see *Guthrie* v. *Wood*, 1 Stark. N. P. 367; *Burling* v. *Paterson*, 9 C. & P. 570; *Ex parte Chaplin*, 26 Ch. D. 319.

(*b*) *West* v. *Skip*, 1 Ves. 245, 456; *Bucknall* v. *Roiston*, Pr. Ch. 286; *Rice* v. *Serjeant*, 7 Mod. 37; *Meggot* v. *Mills*, 1 Ld. Raym. 286. As to the sheriff's liability under such circumstances, see *Imray* v. *Magnay*, 11 M. & W. 267; *Christopherson* v. *Burton*, 3 Exch. 160; *Remmett* v. *Lawrence*, 15 Q. B. 1004; *Lovick* v. *Crowder*, 8 B. & C. 132; *Hunt* v. *Hooper*, 12 M. & W. 664; *Shattock* v. *Carden*, 7 Ex. 725; but see *Remmett* v. *Lawrence*, 15 Q. B. D. 1010, where Lord CAMPBELL appears to disapprove of *Imray* v. *Maynay*.

(*c*) 2 T. R. 587; *Stone* v. *Grubham*, 2 Bulstrode, 218.

(*d*) *Worsley* v. *De Mattos*, 1 Burr. 467; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Carr* v. *Burdiss*, 5 Tyr. 309; *Martin* v. *Podger*, 2

Case the possession of the assignor was treated as fraudulent because "it was not a mere naked possession, but was a possession implying ownership and *jus disponendi* with the knowledge and concurrence of the vendee. The vendor not only continued in possession of the goods, but he sold some of them; he shore the sheep, and marked them with his own mark."(*e*)

It was, moreover, said by Lord ELLENBOROUGH, in *Wardall* v. *Smith*,(*f*) that to render an assignment valid within the statute 13 Eliz. c. 5, there must be an *exclusive* possession under it, and that the *concurrent* possession of the assignor and assignee was colourable, and justified a presumption of fraud. However, if the assignor is merely acting as the assignee's agent or servant,(*g*) or if there are other circumstances showing the joint possession to be consistent with *bona fides* in the parties concerned, the transaction may be sustained. In *Benton* v. *Thornhill*,(*h*) a farmer gave a bill of sale of all his farming stock to secure a debt, and the creditor put in an agent who resided on the premises while he valued the stock for the purposes of the sale; the debtor

W. B. 701; *Cadogan* v. *Kennett*, Cowper, 434; *Eastwood* v. *Brown*, Ry. & Moo. 312; *Woodham* v. *Baldock*, 3 Moore, 11; *Paget* v. *Perchard*, 1 Esp. 205; *Hoffman* v. *Pitt*, 5 Esp. 25; *Lindon* v. *Sharp*, 6 M. & G. 898; *Pennell* v. *Dawson*, 18 C. B. 355; *Macdona* v. *Swiney*, 8 Ir. C. L. R. 73; *Hale* v. *Metropolitan Omnibus Saloon Company*, 28 L. J. Ch. 777; *Reid* v. *Wilmot*, 7 Bing. 577.

(*e*) *Per* LEFROY, C.J., *Macdona* v. *Swiney*, 8 Ir. C. L. R. 73, 83.

(*f*) 1 Camp. 332; but see *Eastwood* v. *Brown*, Ry. & M. 312; and see *Paget* v. *Perchard*, 1 Espin. 205.

(*g*) *Jezeph* v. *Ingram*, 8 Taunton, 838; *Reeves* v. *Capper*, 5 B. N. C. 136; *Dawson* v. *Wood*, 3 Taunt. 256; *Latimer* v. *Batson*, 4 B. & C. 652.

(*h*) 7 Taunton, 149.

being allowed to continue in possession and exercise acts of ownership as before. It was held that a verdict of a jury finding it an honest transaction, and not fraudulent against creditors, could not be disturbed.

And if trustees for the benefit of creditors are empowered by the terms of the trust deed to allow the debtor to use any part of the trust property they may think fit until the debts are collected, here the debtor's possession being permitted by the creditors themselves cannot be considered fraudulent,(*a*) any more than where his possession arises under a lease granted to him by the creditor after the property has been taken in execution.(*b*)

No presumption of fraud, within the statute 13 Eliz. c. 5, will arise from the fact that the mortgagor has been left in possession of the property comprised in a conditional bill of sale.(*c*) And the rule will be the same although the bill of sale contains no express stipulation that the mortgagor shall enjoy until default, for it is consistent with the nature of the transaction

(*a*) *Woodham* v. *Baldock*, 3 Moore, 11 ; *Goss* v. *Neale*, 5 Moore, 19; *Neate* v. *Latimer*, 2 Y. & C. Exch. Ca. 257 ; *Burling* v. *Paterson*, 9 C. & P. 570 ; *Fenn* v. *Bittlestone*, 7 Exch. 152.

(*b*) *Watkins* v. *Birch*, 4 Taunt. 823 ; *Kidd* v. *Rawlinson*, 2 B. & P. 59 ; *Reed* v. *Blades*, 5 Taunt. 212 ; *Baldwin* v. *Cawthorne*, 19 Ves. 166 ; *Law* v. *Skinner*, 2 W. B. 996 ; *Ex parte Games*, 12 Ch. D. 314.

(*c*) 2 Davidson's Conv. ; *Minshall* v. *Lloyd*, 2 M. & W. 450 ; *Stone* v. *Grubham*, 2 Bulstr. 225 ; *Reed* v. *Wilmott*, 5 M. & P. 553 ; *Alton* v. *Harrison*, L. R. 4 Ch. 622 ; *Martindale* v. *Booth*, 3 B. & A. 498 ; *Pennell* v. *Dawson*, 18 C. B. 355 ; *Hale* v. *Metropolitan Saloon Omnibus Company*, 28 L. J. Ch. 777. The rule, however, appears to be different as to an absolute bill of sale. See *Reed* v. *Blades*, 5 Taunt. 212 ; *Edwards* v. *Harben*, 2 T. R. 587.

that the mortgagor should retain possession of the mortgaged property. "It would be not only a great personal inconvenience to a mortgagee to be compelled to occupy the mortgaged property, but he might also thereby deprive the mortgagor of the fruits of his trade, which would enable him to pay the interest and perhaps eventually the principal sum advanced to him."(*d*)

Goods and chattels which are left in the hands of the mortgagor after default made in the payment of the mortgage money, so as to enable him to gain a false credit by appearing to the world as real owner, will pass to the trustee in bankruptcy, under the reputed ownership clauses in the Bankruptcy Act, if the mortgagor becomes bankrupt while the goods remain in his possession.(*e*) And it appears from some cases that the same result may follow where the mortgagor is in possession, and no default has yet been made in payment of the mortgage money.(*f*)

Where a man assigns furniture and household effects to trustees upon trust for his wife and children, no presumption, either within the statute 13 Eliz. c. 5, or the Bankruptcy Acts, will arise from his continuing in possession of the trust property with the beneficiaries; because they can only enjoy it by its remaining in

(*d*) *Per* RICHARDSON, J., in *Steward* v. *Lambe*, 4 Moore, 281; and see *Cook* v. *Walker*, 3 W. R. 357; *Weaver* v. *Joule*, 3 C. B. (N.S.) 309.

(*e*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510; *Ex parte Homan*, L. R. 12 Eq. 598; see also *Ex parte Harding*, L. R. 15 Eq. 223.

(*f*) The Bankruptcy Act, 1883, s. 44 (iii.); *Freshney* v. *Carrick*, 1 H. & N. 653; *Hornsby* v. *Miller*, 1 E. & B. 192; *Shuttleworth* v. *Hernaman*, 1 De G. & J. 322; *Robinson* v. *M'Donnell*, 2 B. & Ald. 134; *Spackman* v. *Miller*, 12 C. B. (N.S.) 659. But see the cases cited in the last note.

the house where they reside with their husband or parent.(*a*)

If the fact of the fraudulent intent be found by the jury, the debtor will not be enabled to shield his property from his creditors by the mere fact that his possession is consistent with the terms of the deed of assignment.(*b*)

No presumption of fraud will arise from the fact that the seller has been left in possession of the property sold in cases where, from the nature of the thing transferred or its situation, actual delivery is impossible, and the seller has done all that was in his power to transfer his right in the goods to the assignee.(*c*) Thus, the delivery of the bill of sale of a ship is equivalent to the delivery of the vessel itself, if it is at sea; though it is otherwise if the ship be in port in the country of its owner, for then, as actual delivery can be made, the fact of the seller being left in possession is evidence of fraud.(*d*) It will also be deemed evidence of fraud if the buyer allows the ship to return and start on another voyage without taking possession.(*e*)

The same principle applies to the delivery of goods while at sea, which pass by indorsement of the bill of lading; but the buyer should not be guilty of laches in taking possession of the goods on their arrival.(*f*)

(*a*) *Cadogan* v. *Kennett*, Cowper, 434; *Arundell* v. *Phipps*, 10 Ves. 139; *Dewey* v. *Bayntun*, 6 East, 257.

(*b*) *Riches* v. *Evans*, 9 C. & P. 640; *Nunn* v. *Wilsmore*, 8 T. R. 521, *per* Le Blanc, J.

(*c*) See *Manton* v. *Moore*, 7 T. R. 67.

(*d*) *Atkinson* v. *Maling*, 2 T. R. 462; "Abbott on Shipping."

(*e*) *Ex parte Matthews*, 2 Ves. 272; *Ex parte Batson*, 3 Bro. C. C. 362.

(*f*) *Brown* v. *Heathcote*, 1 Atk. 160; as to the effect of a pledge

One strong element in repelling the presumption of fraud which arises from the seller being left in possession of his property after an absolute assignment is notoriety in the transfer ; and, therefore, where the circumstances of the sale are well known in the neighbourhood, the goods of the seller will not, by reason of his continuance in possession of them, be liable to be seized by his execution creditors. Lord COKE'S advice with respect to such transactions is contained in *Twyne's Case* ;(*g*) he says : (1.) Let the transfer be made in a public manner and before the neighbours, and not in private, for secrecy is a mark of fraud. (2.) Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. (3.) Immediately after the gift take the possession of the goods, for continuance in possession is a sign of trust.

of a bill of lading, see *Glynn* v. *East and West India Dock Company*, 6 Q. B. D. 475, at p. 495 ; *Bristol Bank* v. *Midland Railway*, 91 Q. B. D. 653 ; *Sewell* v. *Burdick*, 10 App. Cas. 74.

(*g*) 3 Rep. 80 ; and see *Latimer* v. *Batson*, 4 B. & C. 652; *Leonard* v. *Baker*, 1 M. & S. 251 ; *Kidd* v. *Rawlinson*, 2 B. & P. 59 ; *Jezeph* v. *Ingram*, 8 Taunt. 838 ; *Armstrong* v. *Baldock*, Gow, 33 and note, 37 ; *Macdona* v. *Swiney*, 8 Ir. C. L. Rep. 37 ; *Lady Arundell* v. *Phipps*, 10 Ves. 139 ; *Mercer* v. *Peterson*, L. R. 2 Ex. 304 ; L. R. 3 Ex. 104 ; *Ex parte Wilson*, 22 W. R. 241.

CHAPTER X.

Of Possession, Order, and Disposition.

By section 44 (iii.) of the Bankruptcy Act, 1883,(*a*) the property of a bankrupt divisible amongst his creditors shall comprise, *inter alia*, all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, *in his trade or business*, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

By section 43 of the same statute, the bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, *and to commence at*, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition;

The expression "goods" is, by section 168, defined to mean all chattels personal.

(*a*) 46 & 47 Vict. c. 52.

An important alteration in the law of reputed ownership was made by this section of the Bankruptcy Act, for it will be observed that the section only applies to goods in the possession, order, or disposition of the bankrupt *in his trade or business*; in other words, it only applies where the bankrupt is carrying on a trade or business. As to what is and what is not a business must, it would seem, depend upon the circumstances of each particular case.(*b*) Goods belonging to a third party are not within section 44 (iii.), unless they were left with the bankrupt in such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them in the course of his trade or business.(*c*)

Since the section is confined to trade goods, it follows that furniture(*d*) is not included, unless, perhaps, the trade or business be that of a lodging-house keeper.(*e*) And it is in consequence of this section that furniture dealers are able to safely sell furniture to customers on the three years' hire and purchase system.

Under the Act, the property of which the bankrupt is reputed owner appears to be vested in the trustee in bankruptcy for the benefit of the creditors, without the necessity of any order by the court, or of any act on the part of such trustee. See sections 20 and 54.

It will be observed that there is no exception in the Act in favour of registered mortgages and assignments

(*b*) *Ex parte Sully; Re Wallis*, 14 Q. B. D. 950; *Rolls* v. *Miller*, 27 Ch. D. 71.

(*c*) *Colonial Bank* v. *Whinney*, 9 A. C. 426, at p. 440.

(*d*) *Ex parte Nottingham Bank; Re Jenkinson*, 15 Q. B. D. 441, at p. 444.

(*e*) *Ex parte Official Receiver; Re Harrison*, 67 L. T. 600.

of ships; but by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 36, there is a special provision that a registered mortgage of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor at the date of his bankruptcy had the ship or share in his possession, order, or disposition, or was reputed owner thereof, and the mortgage shall be preferred to any right, claim, or interest therein of the other creditors of the bankrupt, or any trustee or assignee on their behalf.

The word "goods" in the above-cited sections of the Bankruptcy Act does not extend to chattels real;(*a*) or to fixtures, unless they are severed from the freehold.(*b*)

Shares in a company, which are transferable only by deed, are "things in action" within the meaning of section 44 (iii.), and are, therefore, not subject to this section.(*c*)

A policy of assurance is a thing in action, and, therefore, comes within the proviso;(*d*) so also, a share in a partnership,(*e*) debentures,(*f*) bonds,(*g*) an interest in chattels subject to a prior life estate.(*h*)

(*a*) *Roe* v. *Galliers*, 2 T. R. 133. As to heirlooms, see *Shaftesbury* v. *Russell*, 1 B. & C. 666.

(*b*) *Horn* v. *Baker*, 9 East, 215; 2 Smith's Leading Cases, 8th edit., p. 214; *Ex parte Reynal*, 2 M. D. & D. 443; *Whitmore* v. *Empson*, 2 Beav. 313.

(*c*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

(*d*) *Ex parte Ibbetson: In re Moore*, 8 Ch. D. 519.

(*e*) *Colonial Bank* v. *Whinney*, 30 Ch. D. 261; *Ex parte Fletcher; Re Bainbridge*, 8 Ch. D. 218.

(*f*) *Ex parte Rensbury; Re Price*, 4 Ch. D. 685.

(*g*) *Ex parte Huggins; Re Huggins*, 21 Ch. D. 85.

(*h*) *Ex parte Singleton*; *Re Tritton*, 61 L. T. 301.

"In order to bring a case within the statute there must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership as such."(*i*) Such consent is a question of fact in each particular case, and the trustee in bankruptcy has to prove the consent of the true owner.(*k*) There is no consent where the bankrupt has obtained the goods from the true owner by fraud; or in cases where the true owner is ignorant of the existence of the property, or of the extent of his rights in it;(*l*) or is an infant, and so incapable of consenting.(*m*)

The true owner will be entitled to a return of his goods if he has demanded them before he had any notice of an act of bankruptcy being committed; for such a demand is a dealing or transaction within section 49 of the Bankruptcy Act, 1883.(*n*)

The principle of the section appears to be that if goods are in a man's possession, order, or disposition under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to

(*i*) *Per* PARKE, B., in *Load* v. *Green*, 15 M. & W. 216; see *Re Bankhead's Trust*, 2 K. & J. 560; *Mace* v. *Cadell*, Cowper, 232; and see Lord REDESDALE'S observations in *Joy* v. *Campbell*, 1 Sch. & Lef. 336.

(*k*) *Ex parte Alexander*, 4 Ch. D. 496.

(*l*) *Load* v. *Green*, *supra*; *Ex parte Ford*, 1 Ch. D. 521; *Re Rawbone's Trust*, 3 K. & J. 476, 300; *Ex parte Richardson*, Buck. 480; *Ex parte Hinds*, 3 De G. & S. 613.

(*m*) *Viner* v. *Cadell*, 3 Esp. 88.

(*n*) *Brewin* v. *Short*, 5 E. & B. 227; *Pariente* v. *Pennell*, 2 M. & Rob. 517; *Ex parte Styan*, 1 Ph. 205; *Ex parte Cohen*; *Re Sparke*, 40 L. J. Bank. 14; *Ex parte Dorman*, L. R. 8 Ch. 51; *Ward* v. *Couston*, L. R. 8 Ch. 144.

suffer the penalty of losing his goods for the benefit of those who have given the credit.(*a*)

In order to bring goods in the order and disposition of a bankrupt within the provisions of the section, they must be in the sole possession and sole reputed ownership of the bankrupt.(*b*)

Goods left after a sale in the temporary possession of the seller for the buyer's convenience are not in the seller's order and disposition.(*c*) And the bankrupt will not be reputed owner of property which has been lodged with him for a specific purpose.(*d*) A buyer has a reasonable time to choose from goods sent to him upon sale or return; if he is allowed to keep them long in his possession, he will be reputed owner, and, in the event of his bankruptcy, the goods will pass to his creditors.(*e*)

The bankrupt will be treated as having the order and disposition of goods left in his hands after an execution, unless there has been a public sale of the goods by the sheriff.(*f*)

(*a*) *Per* JAMES, L.J., in *Ex parte Wingfield*; *In re Florence*, 10 Ch. D. 591, at p. 594.

(*b*) *Ex parte Dorman*; *In re Lake*, L. R. 8 Ch. 51; *In re Bainbridge*; *Ex parte Fletcher*, 8 Ch. D. 218; *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474.

(*c*) *Flyn* v. *Matthews*, 1 Atk. 185; *Wilkins* v. *Bromhead*, 6 M. & G. 963; *Boddy* v. *Esdaile*, 1 C. & P. 62; *Bartram* v. *Payne*, 3 C. & P. 175. See, however, *Knowles* v. *Horsfall*, 5 B. & Ald. 134.

(*d*) *Ex parte Aiken*, 2 Madd. 192; *Ex parte Pease*, 19 Ves. 49; *Ex parte Cotterill*, 3 M. & Ayr. 376; *Carruthers* v. *Payne*, 5 Bing. 270; *Bell* v. *Hamilton*, 24 L. J. Ex. 45.

(*e*) *Gibson* v. *Bray*, 8 Taunt. 76; *Neate* v. *Ball*, 2 East, 117; *Livesay* v. *Hood*, 2 Campb. 83; *Ray* v. *Barker*, 4 Ex. D. 279.

(*f*) *Lingard* v. *Messiter*, 1 B. & C. 308; *Lingham* v. *Biggs*, 1

Goods of which the bankrupt has possession as trustee,(*g*) or *in autre droit*, as an executor or administrator, are not in his order and disposition.(*h*) The same remark applies to goods deposited with him in the capacity of factor or agent: or in any other case where it is the known habit of one person to have the goods of others in his possession.(*i*)

What is known as a custom in a trade may exclude the operation of the order and disposition clause, *e.g.*, it is a custom in the trade of hotel keepers to hire their furniture for the hotel. The onus of proving a custom is cast upon those who assert it. Such custom must be one which the ordinary creditors may be reasonably presumed to have knowledge of, and may be proved by reported decisions or by evidence of the custom.(*k*)

Where a debt is assigned it is necessary that the assignee should give notice of the change of property to the debtor, otherwise the assignor will be reputed

B. & P. 82; *Ex parte Lovering*, L. R. 9 Ch. 621; *Bryson* v. *Wylie*, 1 B. & P. 83 *n*; *Ex parte Shuttleworth*, 1 D. & C. 223; and see *Barrow* v. *Bell*, 5 E. & B. 540; *Fletcher* v. *Manning*, 12 M. & W. 571.

(*g*) *Winch* v. *Keeley*, 1 T. R. 619; *Ex parte Gillett*, 3 Mad. 28; *Ex parte Smith*, 4 D. & C. 579; *Ex parte Witham*, 1 M. D. & De G. 624; but see *Ex parte Burbidge*, 1 Deac. 131.

(*h*) *Ex parte Ellis*, 1 Atk. 101; *Ex parte Marsh*, 1 Atk. 159; *Ex parte Butler*, Ambl. 74; *Viner* v. *Cadell*, 3 Esp. 88; see *Fox* v. *Fisher*, 3 B. & Ald. 135; *Ex parte Thomas*, 3 M. D. & De G. 40; 2 M. D. & De G. 294, S. C.

(*i*) *Thackthwaite* v. *Cock*, 3 Taunt. 487; *Hamilton* v. *Bell*, 10 Exch. 545; *Whitfield* v. *Brand*, 16 M. & W. 282; *Collins* v. *Forbes*, 3 T. R. 316; *Prisman* v. *Lovegrove*, 6 L. T. 329; *Ex parte Watkins*; *In re Couston*, L. R. 8 Ch. 520.

(*k*) *Ex parte Turquand*; *Re Parker*, 14 Q. B. D. 636; *Crawcour* v. *Salter*, 18 Ch. D. 30; *Ex parte Powell*; *Re Matthews*, 1 Ch. D. 501; *Ex parte Brooks*, 23 Ch. D. 261.

owner of the money which is payable, and it will, if he becomes bankrupt, pass to the trustee in bankruptcy.(*a*) However, the order and disposition clause in the new Act (section 44 (iii.), cited above) contains an express proviso excluding from its operation things in action, other than debts due or growing due to the bankrupt in the course of his trade or business. It is not quite clear what is meant by the words "things in action," but it has been decided that they do not include shares in public companies and other similar interests, which are rather property than things in action.(*b*)

By section 10 of the Married Women's Property Act, 1882,(*c*) it is enacted that nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition, or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

For further information on the subject treated of in this chapter reference may be made to the various text books on the Bankruptcy Laws; and also to the work of Mr. Lindley on Partnership, and that of Mr. Smith on Mercantile Law.

(*a*) *Webb's Policy*, 36 L. J. Ch. 341; *Ex parte Monro*, Buck, 300; *Ex parte Burton*, 1 G. & J. 207; *Ex parte Usborne*, 1 G. & J. 358.

(*b*) *Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354. See also *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

(*c*) 45 & 46 Vict. c. 75.

CHAPTER XI.

Concerning Conveyances and Assignments made during Litigation to defeat the Process of the Court.

A VOLUNTARY conveyance or assignment made by a party to a cause, for the purpose of protecting his property from being taken in execution, should the action or suit terminate adversely to him, is fraudulent and void against the party whose execution is sought to be hindered and delayed. Thus, in *Blenkinsopp* v. *Blenkinsopp*,(*d*) a husband, pending proceedings against him by his wife in the Ecclesiastical Court, executed a voluntary settlement of his real and personal estate. The wife obtained a decree for a divorce, and 300*l.* a year alimony was awarded to her. Writs of sequestration were issued against the husband for the alimony and arrears, and for the costs of the suit, but by reason of the voluntary settlement the writs could not be enforced. Upon a bill filed by the wife in Chancery the settlement was set aside as fraudulent and void, the court being of opinion that it was executed by the husband with the view of defeating the process which

(*d*) 12 Beav. 568 ; see also *Reese River Silver Mining Company* v. *Atwell*, L. R. 7 Eq. 347 ; *Partridge* v. *Gopp*, 1 Eden, 163 ; *Muskedy Kazim's Claim*, Perry's Oriental Cases, p. 35 ; *Barling* v. *Bishopp*, 29 Beav. 417 ; *Coulston* v. *Gardiner*, 3 Swans. 279 ; *Northcliffe* v. *Warburton*, 31 L. J. Ch. 777 ; *Musadee Mahomed* v. *Meersa Ally Shoostry*, 8 E. F. Moore, 90 ; *Ex parte Mercer, In re Wise*, 17 Q. B. D. 290. As to the fraudulent removal of goods in order to avoid a distress for rent, see 11 Geo. 2, c. 19.

he knew would issue from the Ecclesiastical Court, if the wife was successful in her suit there.

The sequestration in the case just cited was issued under the authority of an Act of Parliament which had not passed when the voluntary settlement was executed, but the court held that this circumstance made no difference. KNIGHT BRUCE, L.J., said : "We consider it to be demonstrated by the evidence that the deed was executed by the husband with the fraudulent intention of preventing the suit, if successful, from affecting his property. We think that it makes no difference that by a subsequent improvement or alteration in the law a better and more effectual, or a different mode of affecting the property by way of execution has been created, or that the wife has resorted to it rather than to the mode which was alone in force when the deed was executed."

The question whether an assignment for valuable consideration made during litigation can be supported must depend upon whether it was a *bonâ fide* transaction, intended to have real operation according to the purport and character of the instrument by which the transfer was effected, or whether it was a mere colourable affair got up for the purpose of protecting the property of the assignor from being taken in execution, if he was unsuccessful in the suit.(*a*)

(*a*) *Ex parte Mercer, re Wise*, 17 Q. B. D. 290 ; *Wood* v. *Dixie*, 7 Q. B. 892 ; *Hale* v. *Saloon Omnibus Company*, 4 Drewry, 492 ; *Eveleigh* v. *Purssord*, 2 M. & R. 539 ; *Cadogan* v. *Kennett*, Cowper, 434 ; *Dewey* v. *Bayntun*, 6 East, 257 ; *Low* v. *M'Gill*, 12 W. R. 826 ; *Marlow* v. *Orgill*, 8 Jur. (N.S.) 789, 829 ; *Sutton* v. *Bath*, 1 F. & F. 152 ; *Henderson* v. *Lloyd*, 3 F. & F. 7 ; *Young* v. *Barnett*, 1 F. & F. 320 ; *Bunyard* v. *Seabrook*, 1 F. & F. 321 ; *Sladden* v. *Serjeant*,

By section 1 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), it is enacted, that no writ of *fieri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure(*b*) or attachment thereof by virtue of such writ: Provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner.

In *Hobson* v. *Thelluson*,(*c*) a debtor conveyed goods to two of his creditors for the benefit of themselves and his other creditors. It was held that the knowledge of the debtor, at the time of making the deed, that a writ of execution was out against his goods must be taken to be knowledge of the trustees within the proviso in section 1 of the statute just cited; and that consequently, as the title of the trustees was not protected by that section, the goods were bound by the delivery of the writ to the sheriff.

In *Spencer* v. *Slater*,(*d*) a debtor in insolvent circumstances conveyed all his property to trustees on trust, to carry on his business, or get in and realise his estate

1 F. & F. 322; *Herne* v. *Meeres*, 1 Vernon, 465; see *Bott* v. *Smith*, 21 Beav. 511.

(*b*) As to what is actual seizure, see *Gladstone* v. *Padwick*, L. R. 6 Exch. 203.

(*c*) L. R. 2 Q. B. 642.

(*d*) 4 Q. B. D. 13, see also *Bolders* v. *London and Westminster Discount Company*, 5 Ex. D. 47; *Ex parte Chaplin, In re Sinclair*, 26 Ch. D. 319.

as they might deem expedient, and after paying expenses to apportion the residue as an equal rate amongst his creditors. The deed was executed for the purpose of defeating any execution which might prevent an equal distribution, and also for the purposes mentioned in the deed, one was that the trustees might carry on the business irrespective of the wishes of the creditors, and any creditor before getting a dividend was to consent to indemnify the trustees from personal loss. There was a resulting trust in favour of the debtor in respect of the poundage, which any creditor might not accept. The deed was upset, on the ground that it tended to delay creditors and also on the ground of the resulting trust.

A man who is not within the scope of the bankruptcy laws may lawfully prefer one creditor to another ;(*a*) and, therefore, a debtor may lawfully assign the whole of his goods in discharge of a sum due to one of his creditors, although he may thereby disappoint all the rest, and although the others may have obtained judgment for their debts, and have issued execution thereon ; provided, that is to say, the favoured creditor had no notice at the time he took the assignment that the writs had already been delivered into the hands of the sheriff, otherwise he will lose the protection given him by the statute which has just been referred to.(*b*)

(*a*) *Benton* v. *Thornhill*, 7 Taunt, 149 ; *Middleton* v. *Pollock*, 2 Ch. D. 108 ; *Ex parte Games*, 12 Ch. D. 314, 323.

(*b*) *Eastwick* v. *Caillaud*, 5 T. R. 420 ; *Collyer* v. *Fallon*, 1 T. & R. 459 ; *Lee* v. *Green*, 6 De G. M. & G. 155 ; *Goss* v. *Neal*, 5 Moore, C. P. 19 ; *Cookson* v. *Fryer*, 1 F. & F. 328 ; *Westbury* v. *Clapp*, 12 W. R. 511 ; *Stewart* v. *Moody*, 1 C. M. & R. 777 ; see *Cheesman* v. *Exall*, 6 Exch. 341. As to judgments affecting land, see *infra*, Chapter XXVI.

A creditor of an insolvent debtor who dies without having been adjudicated a bankrupt, is entitled to the benefit of any payment, or security made or given by the debtor, although such security or payment would in case of a bankruptcy have been set aside as a fradulent preference.(*c*)

In *Holbird* v. *Anderson*,(*d*) a debtor, against whom an execution was about to issue at the suit of one creditor, went to another creditor, and voluntarily gave him a warrant of attorney to confess judgment for the debt he owed him. The second creditor immediately entered up judgment, issued execution, and seized the debtor's goods before the other creditor could reach them. It was held that the preference given by the debtor to the one creditor over the other was not fraudulent. In *Alton* v. *Harrison*,(*e*) a person, in expectation that a writ of sequestration would issue against him for non-payment of a sum of money ordered to be paid by him into the Court of Chancery, executed a deed of mortgage, which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced, his possession was to cease. A writ of sequestration was subsequently issued. It was held, in

(*c*) *Middleton* v. *Pollock*, 2 Ch. D. 104.

(*d*) 5 T. R. 235 ; *Wood* v. *Dixie*, 7 Q. B. 892 ; *Darvill* v. *Terry*, 30 L. J. Ex. 355 ; see *Bott* v. *Smith*, 21 Beav. 511.

(*e*) 4 L. R. Ch. 622 ; affirming 20 L. T. (N.S.) 1001 ; *Hale* v. *Saloon Omnibus Company*, 4 Drew, 492 ; *Allen* v. *Bonnet*, 18 W. R. 183 ; *Hill* v. *Cowdery*, 1 H. & N. 360 ; *Redway* v. *Sweeting*, L. R. 2 Ex. 400 ; *Ex parte Games*, 12 Ch. D. 314.

spite of the proviso, that the deed was not fraudulent within the statute 13 Eliz. c. 5, against the general creditors of the mortgagor.(*a*) In the case of *The Wolverhampton Banking Company* v. *Marston*,(*b*) an executrix, after probate and after judgment recovered against her for a debt due from her testator, by deed assigned all his property and effects to trustees for the benefit of his creditors, and the assignment was held valid as against the judgment creditor.

Bagot v. *Arnott and Others*,(*c*) was an action of trover. The question was whether the defendants, as execution creditors of one S., were entitled to seize certain goods which the plaintiff claimed as his, and of which he had taken possession under a bill a sale executed to him a few days before by S. Part of the consideration for the bill of sale was money advanced by the plaintiff to S. for the *bonâ fide* purpose of obtaining security for a large pre-existing debt. At the time of the loan the plaintiff was aware that S. had committed felony, and that he intended to apply a portion of the money advanced to him in effecting his escape from this country. It was held that the transaction was valid; and that therefore the plaintiff's possession of the goods could not be disturbed.

(*a*) No point was taken as to the mortgage being an act of bankruptcy.

(*b*) 7 H. & N. 148; *Evans* v. *Jones*, 3 H. & C. 423; *Riches* v. *Evans*, 9 C. & P. 640; *Meux* v. *Howell*, 4 East, 1; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Bowen* v. *Bramidge*, 6 C. & P. 140; see *Symons* v. *George*, 3 H. & C. 68, and S. C. on appeal, p. 996.

(*c*) 2 Ir. Rep. C. L. 1.

CHAPTER XII.

Concerning Conveyances and Assignments made in order to Defeat the Crown.

As the statute 13 Eliz. c. 5, speaks of creditors *and others* who may be defeated of their just and lawful actions, suits, accounts, &c., it has been held to extend to conveyances and assignments made by traitors, felons, and other persons in order to avoid the forfeiture of their lands and goods to the Crown.

One of the earliest cases on this subject is *Pauncefoot's Case*,(*d*) which was this: Pauncefoot, being indicted for recusancy for not coming to Divine service, and having an intent to flee beyond the sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value coloured with feigned consideration; he then fled beyond the sea, and afterwards was outlawed on the same indictment. Upon the question whether this gift was not void, either by the common law or by any statute, some of the judges conceived that the common law, which abhors all fraud, would make void this gift as against the Queen; and there was some doubt whether the statutes against fraudulent conveyances of the preceding reigns applied to such a case. But the whole court agreed that it was reached by the statute 13 Eliz. c. 5, in consequence of the use

(*d*) Lane, 44, 45; cited in *Twyne's Case*, 1 Smith's L. C. 5, 6; see *Ward* v. *Lant*, Pr. Ch. 182, which was the case of a fraudulent assignment to avoid the payment of taxes.

of words *creditors and others* in that Act; by which it appeared to them that its provisions were plainly intended to extend not only to creditors, but to all whose actions, suits, forfeitures, or executions might be in anywise hindered or delayed. And the court further considered that the word forfeiture was not to be confined to the forfeiture of an obligation, recognizance, or the like, but that it was to be extended to everything which shall by law be forfeited to the King or a subject.

Therefore, if a man makes a voluntary settlement of lands with intent that they shall not be forfeited, and afterwards commits treason or felony and is attainted, the settlement is fraudulent and void against the Crown.(*a*) The time which elapsed between the execution of the settlement and the commission of the offence may of course form an important element in considering the evidence of fraudulent intent. If only a few days intervened, the evidence of fraud would, without doubt, be deemed conclusive.(*b*) In *Sir Walter Raleigh's Case*, the act of treason upon which the attainder followed was long after the date of the settlement, but the instrument was nevertheless held void.(*c*)

Lands are not forfeited except upon attainder; and, therefore, where no attainder follows upon conviction of an offence, a settlement by the prisoner of his lands cannot be impeached by the Crown.(*d*)

The forfeiture of lands upon attainder relates back to

(*a*) Viner's Abrid., Fraud (A.), 1, 3.

(*b*) Viner's Abrid., Fraud (A.), 1; Roberts on "Voluntary Conveyances," p. 582.

(*c*) Lane, 48; and *Rex* v. *Nottingham*, Lane, 42.

(*d*) *Rex* v. *Bridger*, 1 M. & W. 145.

the time when the act of treason or felony was committed, so as to avoid all intermediate sales and incumbrances.(*e*) But the forfeiture of goods, and of chattels, real or personal, operates only from the time of the conviction of the traitor or felon; and, therefore, a *bonâ fide* sale for value by the offender of his goods and chattels after the offence and before conviction will be supported. The question whether the sale was without fraud and for valuable consideration is to be left to the opinion of the jury, and is not to be presumed by the court where it is not expressly found as a matter of fact.(*f*) If the assignment is voluntary, or is made merely in pursuance of the moral obligation to provide for a wife, or child, it will not be good;(*g*) for nothing short of a valuable consideration will meet the requirements of section 5 of the statute 13 Eliz. c. 5. Therefore, where a felon who was afterwards convicted made a settlement of his goods, in order to make provision for his son, this was held to be fraudulent against the Crown.(*h*)

In *Saunders* v. *Watson*,(*i*) a prisoner on the eve of trial for felony, assigned all his goods and effects to trustees in trust for his wife, and it was subsequently held that such assignment was within the statute and void as against the Crown.

But an assignment of funds by a prisoner charged with felony to secure the payment of an antecedent debt and the costs to be incurred in his defence is good,

(*e*) 4 Bl. Comm. 381, 386; *Anon.*, 2 Simon, N. S. 71.

(*f*) Hawkins, P. C., bk. 2, c. 49, s. 11.

(*g*) *Shaw* v. *Bran*, 1 Starkie, 319.

(*h*) *Jones* v. *Ashurst*, Skinner, 357; and see *Morewood* v. *Wilkes*, 6 C. & P. 144; *Re Saunder's Estate*, 4 Giffard, 179.

(*i*) 4 Giff. 179.

notwithstanding his subsequent conviction. (*a*) In *Chowne* v. *Baylis*,(*b*) a clerk having robbed his employers of money gave them, upon the discovery of his frauds, an equitable security on policies and on lands for the amount. He was afterwards prosecuted and convicted. It was held that the money abstracted formed a good consideration for the security, and that it was valid. In *Bagot* v. *Arnott*,(*c*) a large sum was due from A. to B. In order to obtain a further advance A. was obliged to execute a bill of sale to B. to cover the whole sum due. B. knew that A. intended to employ the money advanced in effecting his escape from this country, having committed felony. But it was held that the transaction was valid.

An assignment of a felon's goods *bonâ fide* made for a valuable consideration, after the commission day of the assizes, but before the day upon which he is actually tried and convicted, will pass the property.(*d*)

As a voluntary settlement is good against the party making it, and those who claim under him, the property comprised in it will not pass to the Crown upon the subsequent outlawry of the settlor.(*e*)

By the statute 33 & 34 Vict. c. 23, being the statute which abolished forfeiture for felony, it is enacted (section 1), that from and after the passing of this Act no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture

(*a*) *Perkins* v. *Bradley*, 1 Hare, 219.

(*b*) 31 Beavan, 341.

(*c*) 2 Ir. Rep. C. L. 1 ; see *Pearce* v. *Brookes*, L. R. 1 Exch. 213 ; *Cannan* v. *Bryce*, 3 B. & Ald. 179.

(*d*) *Whitaker* v. *Wisbey*, 12 C. B. 44.

(*e*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547, 555.

or escheat; provided that nothing in the Act shall affect the law of forfeiture consequent upon outlawry. By section 9, the Crown is empowered to commit the custody and management of the property of any convict,(*f*) during Her Majesty's pleasure, to an administrator, who is to have full control over such property, and may pay thereout all the convict's debts and liabilities and the costs of his prosecution,(*g*) and may also compensate those parties whom the convict has injured by his criminal acts, and make such allowances to the convict's family and to the convict himself, while lawfully at large, as may be necessary.(*h*) Subject as aforesaid the convict's property is to be preserved, and the income therein invested and accumulated for him or his representatives, until he has completed his term of imprisonment or obtained a pardon, or until his death.(*i*)

The Crown may also appoint an interim curator to manage the convict's property; but on the appointment of an administrator the powers of the interim curator are to cease.(*k*) The Act does not apply to Scotland.

It is considered that the above cases which apply to the Crown would be equally good law at the present time as to an administrator appointed by the Crown under the above-mentioned statute.

(*f*) "Convict" in this Act is defined to mean any person against whom, after the passing of the Act, judgment of death or of penal servitude shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland upon any charge of treason or felony.

(*g*) Sects. 13 and 14.

(*h*) Sects. 15 and 16.

(*i*) Sect. 18.

(*k*) Sects. 21—26.

CHAPTER XIII.

As to Voluntary Settlements of Property which cannot be taken in Execution by Creditors.

THE ground on which a voluntary assignment is held to be fraudulent by virtue of the statute 13 Eliz. c. 5, being that thereby the assignor's creditors are defrauded and delayed in their just suits, actions, accounts, &c., it has been laid down that property which cannot be reached by creditors is not within the purview of the statute, and that, therefore, a voluntary assignment of such property is not fraudulent.(*a*) On this ground it was the rule before the statute 1 & 2 Vict. c. 110, s. 11 (by which copyholds are rendered liable to be extended under an elegit as well as freeholds), that a voluntary assignment of copyholds could not be avoided at the suit of creditors, inasmuch as copyholds were not liable to the debts of the copyholder, unless he charged them by his will, or unless they came within the provisions of the statute 3 & 4 Will. 4, c. 104, which makes copyhold estates assets for the payment of debts.(*b*)

In like manner it was also held, that voluntary assignments of money, bank notes, stock and choses in action could not be impeached by creditors, as money,

(*a*) See the case of *Bayard* v. *Hoffman*, 4 Johnson, Ch. Rep. 450, for the opinion of Mr. Chancellor KENT on this subject, and see 1 Story on Eq. sections 366—368.

(*b*) *Matthews* v. *Feaver*, 1 Cox, 278; *Doe* d. *Tunstill* v. *Bottriell*, 5 B. & Ad. 131; *Doe* v. *Routledge*, Cowper, 705, 710; Scriven on "Copyholds," 39, 122.

bank notes, &c., could not be taken in execution.(*c*) Though an opinion has been intimated that such an assignment might have been avoided by creditors after the assignor's death, in a suit against his executor, as choses in action have always been assets in the hands of an executor for the payment of debts.(*d*)

By section 12 of the statute 1 & 2 Vict. c. 110, the sheriff is empowered by virtue of any writ of *fi. fa.* to take in execution any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects any such writ shall be sued out, And by section 14 of the same Act a judgment may by a judge's order be made a charge upon any government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in the name of the person against whom such judgment shall have been entered up, or in the name of any person in trust for him ;(*e*) and such order is to entitle the judgment creditor to all the remedies he would have been entitled to if a charge had been made in his favour by the judgment debtor, but no proceedings are to be taken until six months after the date of the said order. By section 15, the

(*c*) *Duffin* v. *Furness*, cases tem. Lord King, 97; *Sims* v. *Thomas*, 12 A. & E. 536; *Barrack* v. *M'Culloch*, 3 K. & J. 110; *Nantes* v. *Carrock*, 9 Ves. 189; *Dundas* v. *Dutens*, 1 Ves. jun. 196; *M'Carthy* v. *Goold*, 1 B. & B. 387.

(*d*) *Norcutt* v. *Dodd*, Cr. & Ph. 100; *Rider* v. *Kidder*, 10 Ves. jun. 360.

(*e*) *Warden* v. *Jones*, 2 De G. & J. 76, 86.

order is to operate as a distringas upon the said stock, shares, &c., unless discharged by a judge of one of the superior courts at Westminster. The remedies of judgment creditors against stock, annuities, funds, and shares are extended by 3 & 4 Vict. c. 82, s. 1 ; and by section 18 of 1 & 2 Vict, c. 110, decrees and orders of the Court of Chancery are to have the effect of judgments.

The sheriff has no power under section 12 of the statute 1 & 2 Vict. c. 110, to seize money or securities for money while in the hands of a third person as trustee for the debtor.(*a*) And neither money nor other goods taken in execution become by the seizure the property of the execution creditor. They cannot, therefore, be taken under a *fi. fa.* issued at the suit of a third person against the execution creditor, so long as they remain in the hands of the sheriff. The person levying the second *fi. fa.* must wait until the sheriff has paid over the money or the proceeds of the sale of the goods to the party suing out the execution.(*b*)

The foregoing observations respecting the exemption of money, stock, and choses in action from seizure under an execution applied also to polices of assurance.(*c*) But it is decided that policies of assurance are securities for money within section 12 of 1 & 2 Vict. c. 110, so

(*a*) *France* v. *Campbell*, 6 Jur. 105 ; *Robinson* v. *Pearce*, 7 Dowl. 93. As to money standing in the name of the accountant-general, see *Courtoy* v. *Vincent*, 15 Beavan, 486 ; *Warburton* v. *Hill*, Kay, 470, 478 ; and see *Haly* v. *Barry*, L. R. 3 Ch. 452 ; *In re Womersley, Etheridge* v. *Womersley*, 29 Ch. D. 557.

(*b*) *Collinridge* v. *Paxton*, 11 C. B. 683 ; *Wood* v. *Wood*, 4 Q. B. 397.

(*c*) *Grogan* v. *Cooke*, 2 B. & B. 230.

that they may now be taken in execution by the sheriff under that section.(*d*)

In consequence of money not being liable to be taken in execution, it was doubtful whether a purchase in the name of a wife or child was within the evil intended to be remedied by the statute 13 Eliz. c. 5; for it was said the debtor might have given the money to the parties intended to be benefited in order to enable them to purchase the estate for themselves.(*e*) But as money, bank notes, cheques, &c., may now be taken in execution, it follows as a natural consequence that a purchase in the name of a wife or child, or a third person cannot be supported against creditors. In *Barrack* v. *M'Culloch*,(*f*) WOOD, V.C., said: "The statute 1 & 2 Vict. c. 110, expressly enacts, that money and bank notes shall be capable of being taken in execution, and, therefore, I apprehend that a person largely indebted could not pass over to a child either money or bank notes for the purpose of making a purchase, or if he did, that his creditors might follow the money which he had so handed over covertly as against them into the land, or stock, or whatever else has been purchased

(*d*) *Stokoe* v. *Cowan*, 29 Beavan, 637; see *Law* v. *The Indisputable Life Assurance Society*, 1 K. & J. 223; *Robinson* v. *M'Creight*, 25 Beavan, 272; *Freeman* v. *Pope*, 9 Eq. 206; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*e*) *Fletcher* v. *Sedley*, 2 Vernon, 490; *Glaister* v. *Hewer*, 8 Vesey, 199; *Houghton* v. *Tate*, 3 Y. & J. 486; *Kingdon* v. *Bridges*, 2 Vernon, 67; *Procter* v. *Warren*, Select Cases, tem. Lord King, 78; but see *Christ's Hospital* v. *Budgin*, 2 Vernon, 684; *Stileman* v. *Ashdown*, 2 Atk. 477, 481; *Reddington* v. *Reddington*, 3 Ridgw. P. C. 176; *Peacock* v. *Monk*, 1 Vesey, 127, 130.

(*f*) 3 K. & J. 110, 117; see also *Sims* v. *Thomas*, 12 A. & E. 536; *Drew* v. *Martin*, 2 H. & M. 130; *Freeman* v. *Pope* and *Taylor* v. *Coenen*, *ante*, note (*d*); Sugden, V. & P. (14th edit.) 706.

therewith, and any voluntary gift of it would be void against them."

In *Barton* v. *Vanheythuysen*,(*a*) a man contracted for the purchase of an estate, and afterwards directed it to be conveyed to trustees for the benefit of his wife and children. The transaction was held to be fraudulent and void against creditors; it not being an original purchase for the benefit of the volunteers, but a conveyance of the purchaser's equitable interest to them. The statute 1 & 2 Vict. c. 110 was not referred to.

As money, stock, &c., may now be taken in execution, it follows that purchase-money received upon a sale cannot be settled in such a way as to defeat the just rights of creditors. And the rule is the same, although the subject-matter of the sale could not itself have been taken in execution. In *French* v. *French*,(*b*) a trader, being in insolvent circumstances, agreed to sell his business and stock in trade, in consideration of an annuity to himself during the joint lives of himself and his wife, and of a contingent annuity to the wife, if she survived him. After the trader's death, a creditor's suit was instituted for the administration of his assets, and for the purpose of setting aside the annuity given to the widow on the ground that it was voluntary and fraudulent. The Lord Chancellor said: "I consider the annuity so payable to the widow just in the same light as if it was taken and applied to the husband's own purposes, and abstracted from his creditors; and in my opinion it amounts to a voluntary settlement in favour of his wife. It formed clearly a portion of the consideration which, instead of keeping himself for the

(*a*) 11 Hare, 126.
(*b*) 25 L. J. Ch. 612, S. C.

benefit of his creditors, he chose to keep for the benefit of his wife. The law is clear that such a transaction is fraudulent as against creditors, that is to say, it is an attempt to abstract from creditors what they are entitled to look to for payment of their debts."(*c*) It appeared from one of the exhibits in this case that the consideration for the annuity to the wife was the *name and goodwill* of the husband's business, things which cannot be taken in execution ; but as the settlement abstracted money, which can now be seized, from the creditors, it was looked upon as fraudulent and void against them. In *Neale* v. *Day*,(*d*) an attorney, being in insolvent circumstances, assigned the *goodwill* of his business in consideration of a sum of money paid down, and of an annuity secured by bond to be paid to his wife for life, with remainder to himself for life. The Vice-Chancellor, following *French* v. *French*, decided that the annuity was void against creditors, and said that it was very questionable whether, upon the older authorities alone, such a transaction would not be a fraud within the direct meaning of the statute 13 Eliz. c. 5.

Creditors cannot follow money which has been voluntarily expended by a husband on his wife's estate in redeeming the land tax, in the enfranchisement of copyholds, or in improvements, although the husband was insolvent at the time the expenditure was made.(*e*)

Inasmuch as nothing can be taken in execution which

(*c*) 6 De G. M. & G. 102.

(*d*) 28 L. J. Ch. 45.

(*e*) Sugden, V. & P. 707, 14th edit. ; *Campion* v. *Cotton*, 17 Ves. 264 ; *Burrough's Case*, 17 Ves. 267 ; see *Hamer* v. *Tilsey*, 1 Johnson, 486 ; *Stepney* v. *Biddulph*, 13 W. R. 576.

is not assignable,(*a*) no question can arise under the statute with regard to the pay or half-pay of officers or the pay attached to any office of trust ;(*b*) but under the Bankruptcy Acts, the half-pay of officers and others may be received by the trustee in bankruptcy for distribution amongst the creditors.(*c*)

As to the liability of married women, see Chapter II., *ante*.

(*a*) See Bing on "Executions" 104.

(*b*) *Stone* v. *Lidderdale*, 2 Anstr. 533 ; *M'Carthy* v. *Goold*, 1 B. & B. 387, 390 ; *Barwicke* v. *Reade*, 1 H. Bl. 627 ; 1 & 2 Vict. c. 110, ss. 55, 56.

(*c*) See 46 & 47 Vict. c. 52, s. 53, and 32 & 33 Vict. c. 71, s. 89.

CHAPTER XIV.

Who may take advantage of the Statute 13 *Eliz.* c. 5.

THE statute 13 Eliz. c. 5, expressly declares a fraudulent gift or alienation to be void *only* against those persons, their heirs, successors, executors, administrators, and assigns, whose actions, suits, debts, &c., are or may be in anywise disturbed, hindered, or delayed. As a voluntary settlement is good against the party executing it and those who claim under him, the property comprised in it which remains after satisfying the settlor's creditors will be bound by the trusts of the settlement.(*d*)

The executors and administrators of the voluntary settlor will be bound by the settlement ;(*e*) and so will his heir, who will have no claim to contribution from the voluntary grantee, if an execution creditor realizes his debt solely out of the descended lands.(*f*) In *Packman's Case*,(*g*) it was held that a *bonâ fide* sale by an administrator could not be impeached, although it was made pending a citation by the next-of-kin to have

(*d*) *Ex parte Bell*, 1 Gl. & Ja. 282; *Curtis* v. *Price*, 12 Ves. 103; *Ramm* v. *Cartwright*, 2 Freem. 183; see *Shaw* v. *Jeffrey*, 13 Moore P. C. C. 432.

(*e*) *Hawes* v. *Leader*, Cro. Jac. 270; *Luff* v. *Horner*, 3 F. & F. 480.

(*f*) *Sir W. Harbert's Case*, 3 Rep. 12 b; see *Ker* v. *Ker*, 3 Ir. Eq. Rep. 489.

(*g*) 6 Rep. 18 b.

the administration repealed, and with the intent to defeat the plaintiff in the spiritual court of the effect of his suit. And it was said that even if the assignment had been fraudulent, it would have remained good against a second administrator; although it would have been void by statute 13 Eliz. c. 5, against creditors.

A voluntary settlement which hinders or delays creditors cannot be sustained against the trustee in bankruptcy of the settlor, for such trustee represents the creditors for whose benefit the statute was made.(*a*)

A voluntary settlement will be supported against those creditors who have been privy or have assented to the execution of it.(*b*) Thus in *Oliver* v. *King*,(*c*) two brothers, John King and James King, were in partnership as brewers. James purchased John's share, and gave a bond to secure the unpaid purchase-money. Afterwards, James King being ill, upon the advice of John King, executed a voluntary settlement of part of his leasehold estate in favour of his (James King's) two sons. The whole transaction was carried out with the concurrence, and through the instrumentality of John King; and there was no evidence that he acted in ignorance of any fact material for him to know, or

(*a*) *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531; *Robinson* v. *M'Donnell*, 2 B. & Ald. 134; *Tyrrell* v. *Hope*, 2 Atk. 562; see *Davis* v. *Snell*, 6 Jur. (N.S.) 1134; *Kent* v. *Riley*, L. R. 14 Eq. 190; *Ex parte Russell*, 19 Ch. D. 588; *Ex parte Butters*, 14 Ch. D. 265, at p. 267.

(*b*) *Steel* v. *Brown*, 1 Taunt. 381; *Bamford* v. *Brown*, 2 T. R. 594, *n.* Creditors who have been in any way privy to a fraudulent assignment cannot set it up as an act of bankruptcy. *Ex parte Alsop*, 1 De G. F. & J. 289; *Ex parte Stray*, L. R. 2 Ch. App. 374.

(*c*) 8 De G. M. & G. 110.

that any misrepresentation was made to him. No steps were taken to impeach the settlement during John King's lifetime; but, on the contrary, he took part with the grantees under the settlement in transactions which proceeded on the assumption of its validity. After John King's death his executors filed a bill to set aside the deed as voluntary and fraudulent against their testator, and the other creditors of James King; but it was held that the executors were without remedy in consequence of John King's concurrence in the deed, and of the part he had taken in procuring it to be executed.

A voluntary deed is also good against strangers. The sheriff or other officer executing process without proof of the legal authority under which he is acting is a stranger within the meaning of the rule. To prove his authority it is not sufficient to produce the writ of execution, but the judgment obtained by the execution creditor must also be proved.(*d*) "It is an established rule of law," said JERVIS, C.J., in *White* v. *Morris*,(*e*) "that the mere production of the writ and nothing more will not enable the sheriff to show that a deed, good as against all except creditors, is fraudulent and void. He must show that he represents a creditor. For this purpose the bare production of the writ is not enough. The writ merely authorizes and directs the sheriff to do a certain act, and his indorsement or return thereon is a mere statement that he has done as he was directed. There is no statement that a judgment exists; but only that somebody says that a judg-

(*d*) *White* v. *Morris*, 11 C. B. 1015; *Bessey* v. *Windham*, 6 Q. B. 166, *contra*.

(*e*) 11 C. B. 1028, 1029.

ment has been obtained. I think that the production of the writ in this case was not evidence that a judgment existed."

The voluntary assignor of goods and chattels is bound by the assignment only when the *property* in the articles delivered is actually transferred to the assignee. If he can show that no real assignment ever took place, and that the whole transaction was a mere contrivance got up to delay creditors, he may recover back his goods from the assignee in an action of trover. In *Bowes* v. *Foster*,(*a*) the plaintiff, being embarrassed and in fear of an execution against his goods, agreed with the defendant that there should be a pretended sale of the goods to him. A forged invoice and receipt having been made out, possession of the goods was delivered to the defendant, and he afterwards sold them as his own. It was held, in an action of trover for the goods bought by the plaintiff, that no property in the goods passed to the defendant, and that the plaintiff might show that no money was, in fact, paid, and that the whole transaction was not a real but a fictitious sale.

And although as a general rule equity will not interfere to assist a person in recovering back property which has been assigned to another for an illegal purpose, nevertheless this rule does not apply where the illegal purpose has not been carried into execution, and nothing has been done under the deed of assignment.(*b*)

Therefore, if a man assigns his property to a trustee with the view of defeating his creditors, and afterwards compounds with them or discharges their claims, equity

(*a*) 2 H. & N. 779 ; see *Cheesman* v. *Exall*, 6 Exch. 341.

(*b*) *Davies* v. *Otty*, 35 Beav. 208 ; see *Coutwas* v. *Swan*, 18 W. R. 746.

will compel the trustee to restore the property to the assignor. In *Symes* v. *Hughes*,(*c*) the plaintiff being embarrassed signed certain leasehold property to a trustee in order to defeat his creditors. Shortly afterwards, he was adjudicated a bankrupt, but obtained the sanction of the creditors under section 110 of the Bankruptcy Act, 1861, to an arrangement by which his estate and effects were revested in him. At the same time he covenanted to prosecute a suit for the recovery of the assigned property, and to pay a composition to his creditors, in case the suit should terminate successfully. It was held that the plaintiff was entitled to have the property re-conveyed to him by the defendant, who claimed through the original assignee and trustee.

The rights of creditors under the statute 13 Eliz. c. 5, are legal rights, and mere delay in taking proceedings is no defence to an action if the delay has not continued long enough to bar the plaintiff's legal rights.(*d*)

(*c*) L. R. 9 Eq. 475.
(*d*) *In re Maddever*, 27 Ch. D. 523.

CHAPTER XV

As to how far the Property comprised in a Fraudulent Conveyance in Assets in the hands of the Grantor's Heir or Executor for the Payment of Debts—and herein of Donationes mortis causâ.

Sect. 1. - *As to Real Property.*

As the statute 13 Eliz. c. 5 declares that a fraudulent conveyance shall be void as against creditors and others, whose executions, &c., are delayed, hindered, or defrauded ; a voluntary conveyance, when it is declared fraudulent, is treated with respect to the parties injured as if it had never been made.

Thus, where to a writ of *formedon* the defendant pleaded *non tenure*, and upon issue joined it was found that before the writ purchased the defendant enfeoffed divers persons to the intent to defraud them which had cause of action against the same lands, and notwithstanding he took the profits, a verdict was given for the demandant, for the feoffment was void by 13 Eliz. c. 5.(*a*) And so it is said in the *Lex Prætoria*:(*b*) "Where a man makes a voluntary conveyance with power of revocation, and afterwards contracts bond or other debts, which only bind the person, such creditors suing the debtor to judgment shall extend the lands *in the hands of the voluntary conveyor*, and make a title in an elegit to the lands in *his* hands notwithstanding such voluntary conveyance."

(*a*) *Leonard* v. *Bacon*, Cro. Eliz. 234.
(*b*) Cited in "Roberts on Fraudulent Conveyances," 591.

It is for this reason that the property comprised in a covinous conveyance is assets in the hands of the heir or devisee for the payment of the debts of the ancestor or testator. If the heir plead *riens per descent* in an action brought against him by the creditors of the ancestor, he cannot support his plea by setting up a voluntary assurance which is proved to have been made by the ancestor for the purpose of defrauding creditors.(*c*) In *O'Connor* v. *Bernard*,(*d*) Roger O'Connor being indebted to Arthur O'Connor by specialty and simple contract, and being sued in equity for the amount, executed in 1816 a voluntary deed whereby he conveyed certain real estates to W. O'Connor and her heirs. In 1817 judgment was given in favour of Arthur O'Connor for payment of the money due to him, and thereupon a sequestration issued. The sequestrators entered into possession of the lands comprised in the deed of 1816, and so continued until the death of Roger O'Connor in 1834. In 1826 W. O'Connor sold the lands to the defendant, who had full notice of all the circumstances under which the deed of 1816 was executed. In 1833 the statute 3 & 4 Will. 4, c. 104, which makes real estate assets for the payment of simple contract debts was passed. A bill having been filed by Arthur O'Connor to have the deed of 1816, and also the conveyance to the defendant, declared fraudulent and void, the court set both instruments aside, and held that Roger O'Connor died seised of the lands intended

(*c*) *Apharry* v. *Bodingham*, Cro. Eliz. 350 ; *Fermor's Case*, 3 Rep. 78 b ; *Humberton* v. *Howgil*, Hobart, 72 ; *Sagittary* v. *Hide*, 2 Vernon, 44 ; *Gooch's Case*, 5 Rep. 60 ; and see *Cornish* v. *Clarke*, L. R. 14 Eq. 184 ; Sheppard's Touchstone, 66.

(*d*) 2 Jones, 654.

to be conveyed by them. Consequently, these lands were held to be assets for the payment not only of specialty, but also of simple contract debts.

It follows from what has been said, that neither the heir nor devisee can make any voluntary disposition of the descended or devised property which has the effect of defeating the creditors of the ancestor or testator.(*a*) A devise by the heir of the descended property is within the Statutes of Fraudulent Devises,(*b*) and therefore void against the ancestor's creditors.(*c*)

Before the Statutes of Fraudulent Devises, the ancestor's creditors had no remedy against the heir if he disposed of the assets for valuable consideration before action brought, though in equity he was respon-

(*a*) *Gooch's Case*, 5 Rep. 60 ; *Apharry* v. *Bodingham*, Cro. Eliz. 350 ; *Richardson* v. *Horton*, 7 Beav. 112.

(*b*) 3 & 4 Will. & M. c. 14, repealed and re-enacted by 11 Geo. 4 & 1 Will. 4, c. 47. These statutes gave creditors by specialty in which the heirs were bound the same rights against the devisee of their debtor that they formerly had against his heir. "Before 3 & 4 Will. & M. c. 14, if the debtor devised away his land, so that nothing descended, the right of the creditor was defeated. The heir was not liable, because by the act of the debtor in devising away his land the heir was enabled to plead *riens per descent*. The devisee was not liable, for the bond or other specialty in no way affected him. To remedy this evil the Legislature interposed, by putting the creditor in all cases in the same situation *as if no will had been made* ; it declared all wills void as against him." *Per curiam* in *Hunting* v. *Sheldrake*, 9 M. & W. 256, p. 263. The remedy of the creditor under 3 & 4 Will. & M. c. 14, was confined to action of debt. By the later Act his remedy is extended to actions of covenant. For further information on the Statutes of Fraudulent Devises, see Williams on Real Assets ; Shelford on the Real Property Statutes ; and Chitty's Collection of the Statutes.

(*c*) *Kinaston* v. *Clarke*, 2 Atk. 205 ; *Tyndale* v. *Warre*, Jacob. 212, 218.

sible for the value of the land aliened.(*d*) By section 6 of 11 Geo. 4 and 1 Will. 4, c. 47,(*e*) it is enacted, that in all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators ; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said lands, as if the same were his own proper debt or debts ; saving that the lands, tenements and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution. Section 8 of the same statute(*f*) makes devisees liable and chargeable in the same manner as heirs at law, notwithstanding the lands, tenements and hereditaments devised to them shall be aliened before action brought.

A marriage settlement executed by the heir or devisee of the descended or devised lands will prevent them from being taken in execution ;(*g*) but a mere assign-

(*d*) *Kinaston* v. *Clarke*, 2 Atk. 204 ; *Coleman* v. *Winch*, 1 P. Wms. 777.

(*e*) This section is a re-enactment, with some slight alterations, of section 5 of 3 & 4 Will. & M. c. 14.

(*f*) This is a re-enactment of 3 & 4 Will. & M. c. 14, s. 7.

(*g*) *Spackman* v. *Timbrell*, 8 Simon, 253 ; *Richardson* v. *Horton*, 7 Beav. 112 ; *Matthews* v. *Jones*, 2 Anstr. 506 ; see *Higgins* v. *Shaw*, 2 Dr. & War. 356 ; *Hynes* v. *Redington*, 10 Ir. Ch. Rep.

ment to new trustees by devisees in trust will not, otherwise "a very easy method of evading the statute and protecting the land would always be open, and a renunciation by the trustees to whom the legal estate is devised, and a conveyance of it to new trustees would in every case render the liability of the devisee only a personal one."(*a*) Where an equitable interest only is aliened for valuable consideration before action brought, this will not prevent a judgment creditor from seizing the legal estate; though the courts of equity will, upon application being made to them, prevent the equitable interest so aliened from being affected by the execution.(*b*)

The foregoing remarks upon the Statutes of Fraudulent Devises apply with equal force since 3 & 4 Will. 4, c. 104, which makes the real estates of deceased persons liable to simple contract debts; because debts of this class are not made by the Act a specific charge or lien on the real estates of the debtor any more than specialty debts were before. Lands, therefore, which are *bonâ fide* aliened by the heir or devisee before action brought cannot be taken in execution by simple contract creditors.(*c*)

206, 207; *Collyer* v. *Finch*, 5 H. of L. 905, 923; *Ball* v. *Harris*, 4 M. & C. 264; *Williams* v. *Massey*, 15 Ir. Ch. Rep. 47; *Barrow* v. *Griffith*, 13 W. R. 41; *Bateman* v. *Bateman*, 1 Eq. Ca. Abr. 149.

(*a*) *Per* Lord CHELMSFORD in *Coope* v. *Cresswell*, L. R. 2 Ch. 112, 122; L. R. 2 Eq. 106, S. C.

(*b*) *Coope* v. *Cresswell*, L. R. 2 Ch. 112, 122; L. R. 2 Eq. 106, S. C.; *Ex parte Baine*, 1 M. D. & De G. 492; *British Mutual Investment Company* v. *Smart*, L. R. 10 Ch. 567; *Coope* v. *Cresswell*, *supra*, when before the Vice-Chancellor; *Pimm* v. *Insall*, 1 Mac. & Gor. 448.

(*c*) *Spackman* v. *Timbrell*, 8 Simon, 253; *Woodgate* v. *Woodgate*, Sugden on V. & P. 656 (14th edit.); *Kinderley* v. *Jervis*, 22 Beav. 1;

Equity will grant an injunction at the suit of the creditors of the ancestor or devisor to prevent a purchaser of the descended or devised estates from paying over the purchase-money to the heir or devisee, if there is danger of such money being lost or misapplied.(*d*)

As the heir or devisee takes an interest in the descended or devised estates only so far as they are not wanted for the payment of the ancestor's or testator's debts, even the simple contract creditors of a deceased person will be allowed priority over the judgment creditors of his heir or devisee.(*e*)

The heir or devisee have, like an executor, the right of retaining their own debts out of the assets which have descended or been devised to them before paying other creditors of equal degree. They may also retain the debt of their trustee or *cestui que trust*; and if the devisee happens to be the executor of a deceased creditor he may retain the debt due to his testator.(*f*) But in *Bain* v. *Sadler*,(*g*) it was held that a devise of real estate to a trustee for the payment of debts does not give him a right to retain a debt due to him

Jones v. *Noyes*, 4 Jur. (N.S.) 1033. The purchaser must see that legacies charged on the land are paid, for the statute has not altered his liability in this respect. *Horn* v. *Horn*, 2 S. & S. 448, unless the property is being sold by trustees under a trust for sale.

(*d*) *Green* v. *Lowes*, 3 Bro. C. C. 217; *Matthews* v. *Jones*, 2 Anstr. 506; Sugden on V. & P. 656, (14th edit.); Kerr on Injunctions, 596.

(*e*) *Kinderley* v. *Jervis*, 23 Beav. 1; *De Sorbein* v. *Bland*, 2 De G. & J. 158; *Chapman* v. *Ladbrooke*, 4 Esp. 149.

(*f*) *Loomes* v. *Stotherd*, 1 S. & S. 458; *Player* v. *Foxhall*, 1 Russ. 538; 2 Wms. Exors. 973, (6th edit.).

(*g*) L. R. 12 Eq. 570.

from his testator, although the trustee may also be the executor of the will.

It should be remembered, that by 32 & 33 Vict. c. 46 (1st January, 1870), specialty creditors have no longer any priority over simple contract creditors.

SECT. 2.—*As to Personal Property.*

Personal property comprised in a settlement which is set aside as fraudulent within the statute 13 Eliz. c. 5, will be assets after the settlor's death in the hands of his executor or administrator for the payment of his debts.(*a*) A person to whom goods and chattels have been assigned for the purpose of defrauding creditors is liable to be charged as executor in his own wrong, if he disposes of the property after the assignor's death.(*b*)

Where a sale by an executor is presumably made in discharge of his duty to administer his testator's property, a purchaser from him is not bound to see to the application of the purchase-money ;(*c*) but where there are circumstances amounting to fraud or to a breach of trust, as if the sale was at an undervalue,(*d*) or the

(*a*) *Shears* v. *Rogers*, 3 B. & Ad. 362 ; *Hue* v. *French*, 26 L. J. Ch. 317 ; *Richards* v. *James*, L. R. 2 Q. B. 285, 291 ; Roberts on Voluntary Conveyances, 595.

(*b*) *Edwards* v. *Harben*, 2 T. R. 587 ; *Hawes* v. *Leader*, Cro. Jac. 271.

(*c*) *Haynes* v. *Forshaw*, 11 Hare, 93, 99 ; *Scott* v. *Tyler*, 2 Dickens, 724 ; *Walker* v. *Taylor*, 8 Jur. (N.S.) 681 ; *Bonney* v. *Ridgard*, 1 Cox, 145 ; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125, 137 ; *Cubbidge* v. *Boatwright*, 1 Russ. 549 ; *Collinson* v. *Lister*, 7 De G. M. & G. 634 ; *Vane* v. *Rigden*, L. R. 5 Ch. 663 ; *Hill* v. *Simpson*, 7 Ves. 169 ; *Keane* v. *Roberts*, 4 Madd. 357 ; *Collingwood* v. *Russell*, 34 L. J. Ch. 22 ; *Farhall* v. *Farhall*, L. R. 7 Ch. 123 ; see *Coles* v. *Miles*, 10 Hare, 179.

(*d*) *Rice* v. *Gordon*, 11 Beav. 265.

purchaser knew that it was made for the executor's own private purposes, then the assets may be followed by the testator's creditors.(*e*)

Where a legacy has been paid or delivered to a legatee, a purchaser from him cannot be called upon to pay any portion of a debt subsequently established against the testator's estate.(*f*) In *Dilkes* v. *Broadmead*,(*g*) assets, consisting of personalty which could be identified, were settled *bonâ fide* upon the marriage of a residuary legatee. It was held that the settled property ceased to be liable to subsequently accruing claims against the testator's estate, arising from the breach of certain covenants entered into by him during his lifetime; of the existence of which covenants the parties to the settlement had no notice at the time the settlement was made.

SECT. 3.—*As to the Position of a voluntary Creditor under an Administration.*

A voluntary bond or covenant is payable out of the assets of the obligor or covenantor,(*h*) although no

(*e*) *Gavin* v. *Hadden*, 3 L. R. Pr. C. 707; *Haynes* v. *Forshaw*, 11 Hare, 93, 99; *Watkins* v. *Cheek*, 2 S. & S. 199. It has been held *at law* that an executor may sell in consideration of his own private debt, if there is no fraud. *Doe* v. *Fallows*, 2 C. & J. 481; *Whale* v. *Booth*, 4 T. R. 625, note, and see *Re Troughton*, 71 L. T. 427.

(*f*) *Noble* v. *Brett*, 24 Beav. 499, 512.

(*g*) 2 Giff. 113; *Spackman* v. *Timbrell*, 8 Simon, 253, 260; *Ward* v. *Ward*, 4 Ir. Ch. Rep. 415; *Williams* v. *Massey*, 15 Ir. Ch. Rep. 47, 66; see 22 & 23 Vict. c. 35, s. 29.

(*h*) The same principle has been applied to a promissory note given by a testator without consideration. *Dawson* v. *Kearton*, 3 Sm. & Giff. 186; but see the observations on this case in Lewin on Trusts, Ch. 6, s. 27, note.

breach occurred during his lifetime.(*a*) A debt accruing under a voluntary bond or covenant will if not to the prejudice of creditors be paid before legacies; but it will be postponed in favour of creditors for value, although their debts accrued by simple contract.(*b*)

The doctrines of equity with respect to the marshalling of securities and assets are allowed to prevail in favour of parties claiming under voluntary settlements and other instruments. In *Hales* v. *Cox*,(*c*) Thomas Hales executed a voluntary settlement of real estate in trust for his children, and covenanted that the estate should remain to the uses declared and for quiet enjoyment. He afterwards mortgaged the same estates, together with some unsettled property, and died. It was held that the unsettled estates ought to bear the burden of the mortgage before the settled estates were charged with it; and that the amount payable by the settled estates towards the mortgage constituted a debt under the covenant for quiet enjoyment, which was payable out of the settlor's assets in preference to legatees,

(*a*) *Jenkins* v. *Bryant*, 6 Simon, 601; *Watson* v. *Parker*, 6 Beav. 283. If a covenant is broken (though the damages are unliquidated) the covenantee is a specialty creditor against the covenantor's estate. *In re Dickson*, L. R. 12 Eq. 154; *Musson* v. *May*, 3 V. & B. 194; *Cox* v. *Barnard*, 8 Hare, 310; but see *Hervey* v. *Audland*, 14 Simon, 531.

(*b*) *Ramsden* v. *Jackson*, 1 Atk. 292; *Drakeford* v. *Wilkes*, 3 Atk. 540; *Jones* v. *Powell*, 1 Eq. Abr. 84, pl. 2; *Fairebeard* v. *Bowers*, 2 Vernon, 202; *Patch* v. *Shore*, 2 D. & S. 589; *Dening* v. *Ware*, 22 Beav. 188; Wms. Exors. 869, 9th edit.; and see *Edwards* v. *Edwards*, 2 Cr. & M. 612. Voluntary creditors are postponed to creditors for value in bankruptcy. *Gardner* v. *Shannon*, 2 Sch. & Lef. 228; *Ex parte Spurrier*, Mont. 246.

(*c*) 32 Beav. 118; see *Ker* v. *Ker*, 3 Ir. R. Eq. 489; *Anstey* v. *Newman*, 39 L. J. Ch. 769.

although after creditors for value. And in *Lomas* v. *Wright*,(*d*) it was held that creditors by speciality, although volunteers, were entitled, as against devisees, to stand in the place of mortgagees who had exhausted the whole of the fund provided by the testator for the payment of his debts.

The voluntary assignee of a debt is not a creditor of the original debtor, and, therefore, cannot maintain a suit for the administration of the debtor's estate after his decease.(*e*) But an assignee for value of an equitable interest in a sum of money payable under a voluntary bond is entitled to claim as a specialty creditor for value against the assets of the obligor.(*f*)

In *Tanner* v. *Byne*,(*g*) a husband made a post-nuptial settlement of 4,000*l.* in favour of his wife and children, and then, in consideration of the 4,000*l.* expressed to have been lent to him by the trustees of the settlement, made a mortgage to them of real estate to secure that sum, and covenanted to repay it. The husband never, in fact, paid the 4,000*l.* to the trustees; but it was held that they were, notwithstanding, entitled to rank as specialty creditors for value against his estate, and that the transaction was substantially the same as if the 4,000*l.* had been actually paid by the husband, and then had been returned to him by way of loan.

As to whether a voluntary bond which has been lost

(*d*) 2 M. & K. 769; and see *Boazman* v. *Johnston*, 3 Sim. 377; *Mills* v. *Eden*, 10 Mod. 487; *Sneed* v. *Culpepper*, 7 Viner's Abridg. 52, pl. 7; and *Haylock* v. *Robotham*, cited in 1 Seton on Decrees, 1962, 5th edit., and in a note to *Dolphin* v. *Aylward*, L. R. 4 H. L. 494.

(*e*) *Sewell* v. *Moxsy*, 2 Sim. (N.S.) 189.

(*f*) *Payne* v. *Mortimer*, 4 De G. & J. 447.

(*g*) 1 Simon, 160.

can be established against the obligor and his representatives, see 3 Jarman & Bythewood's "Conveyancing" 392, title Bond.

SECT. 4.—*Donationes Mortis Causâ.*

A *donatio mortis causâ* is a species of voluntary gift, which it is desirable to notice before concluding this chapter. A few short remarks in this place will suffice as the subject is fully considered in the works of Mr. Roper, Jarman, and other writers.

A *donatio mortis causâ* is a voluntary gift of personal property made by a man in contemplation of the conceived approach of death.(*a*) It is revocable during the donor's lifetime, and will be void if he recover from his then existing disorder. The donor must part with all dominion over the property, and actually deliver the gift into the hands of the donee or of the donee's agent. If actual delivery is impossible it will be sufficient to assign the means of coming at or of making use of the thing transferred. Therefore, the delivery of the key of a warehouse will pass the goods which are deposited in it.(*b*) It was at one time considered that there could be no good *donatio mortis causâ* of property which does not pass by delivery; and, consequently, that a gift of a policy of assurance, negociable instrument payable to order, or the like, was invalid. Now, however, it is held that where there is an actual transfer of a bond, policy, or deposit note, or other written security, or of the title deeds relating

(*a*) *Duffield* v. *Elwes*, 1 Bligh (N.S.) 497, 530, *per* Lord ELDON; *Lawson* v. *Lawson*, 1 P. W. 441; *Miller* v. *Miller*, 3 P. W. 357.

(*b*) *Ward* v. *Turner*, 2 Ves. sen. 431; *Moore* v. *Moore*, L. R. 18 Eq. 474.

to property, this will create a trust in favour of the donee, which he may enforce in equity against the executors of the donor.

A cheque payable to the donor or order and without having been endorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order and will pass as a good *donatio mortis causâ*.(*c*)

There can be no good *donatio mortis causâ* where no property passes to the donee. Therefore, the delivery of the book of a depositor in a savings' bank is not a sufficient donation of the money deposited; and the same has been held of a delivery of receipts for South Sea Annuities,(*e*) cheques drawn by the donor and not presented for payment, or not payable till after his death,(*f*) and railway debenture scrip.(*g*) The rule, however, that delivery of a chattel is essential in order to constitute a valid *donatio mortis causâ* is satisfied by an antecedent delivery of the chattel *alio intuito* to the donee.(*h*)

A *donatio mortis causâ* may be proved by the evidence of the donee himself;(*i*) but as gifts of this nature

(*c*) *Clement* v. *Cheesman*, 27 Ch. D. 631.

(*d*) *M'Gonnell* v. *Murray*, 3 Law Rep., Ir. Eq. 460.

(*e*) *Ward* v. *Turner*, 2 Ves. sen. 431; *Moore* v. *Moore*, L. R. 18 Eq. 474; but see *Moore* v. *Darton*, 20 L. J. Eq. 626.

(*f*) *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *Beak* v. *Beak*, L. R. 13 Eq. 489; *Rolls* v. *Pearce*, 5 Ch. D. 730; *In re Mead*, 15 Ch. D. 654.

(*g*) *Moore* v. *Moore*, L. R. 18 Eq. 474.

(*h*) *Cain* v. *Moon*(1896), 2 Q. B. 283; *Richer* v. *Voyer*, L. R. 5 P. C. 46.

(*i*) *M'Gonnell* v. *Murray*, *supra*; *Hayslep* v. *Gayner*, 1 A. & E. 162.

open a wide door to fraud, they will not be supported unless the fairness of the transaction is made out by the clearest evidence.(*a*)

A *donatio mortis causâ* differs from a legacy in this respect; that it need not be proved in the Ecclesiastical Court; that it cannot be revoked by the will or codicil of the donor; and that no assent on the part of the personal representative is necessary to perfect the gift. The reason of this is that the donee claims not under the will, but under a gift *inter vivos* completed during the lifetime of the donor.

A *donatio mortis causâ* so far resembles a legacy that it is liable to legacy duty, may be made to the donor's wife, and may be revoked by him during his life. It is, moreover, like a legacy, subject to the debts of donor in case of his assets proving insufficient.

(*a*) *Per* Lord CHELMSFORD, in *Cosnahan* v. *Grice*, 15 Moo. P. C. 215, 223.

CHAPTER XVI.

Of the Provisions of the Bankruptcy Act respecting Voluntary and Fraudulent Conveyances and Assignments.

EVEN where a settlement is valid as against creditors under the statute 13 Eliz. c. 5, yet such a settlement may be void as against the settlor's trustee in bankruptcy or liquidation under certain circumstances, viz.(*b*) :—

(1.) If it be voluntary, and the settlor becomes bankrupt, or liquidates his affairs within two years of the date of the settlement.

(2.) If it be voluntary, and the settlor becomes bankrupt or liquidates his affairs after two years but within ten years of the date of the settlement; unless it can be shown that he was solvent at the date of the settlement without the aid of the property comprised in it; and that his estate or interest in such property passed to the trustees of the settlement on its execution.

(3.) If it consists of a mere covenant or contract made in consideration of marriage, for the future settlement upon the settlor's wife or children, of any specific and earmarked(*c*) money or property wherein the settlor had

(*b*) See section 47 of Bankruptcy Act, 1883.

(*c*) *Ex parte Bishop; Re Tonnies*, 8 Ch. App. 718.

not at the date of his marriage any estate or interest, vested or contingent(*a*) (and not being money or property of, or in right of, his wife), unless such property or money has been actually transferred or paid in pursuance of such contract or covenant.

A settlement of property accrued to the settlor since marriage in right of his wife, or the trusts of a policy of assurance effected in favour of a wife or children under the provisions of section 11 of the Married Women's Property Act, 1882, are, however, not affected by the Bankruptcy Act.

The forty-seventh section of the Bankruptcy Act, 1883, does not apply to the administration of a *deceased* insolvent by the court of bankruptcy under section 125 of the Act.(*b*)

A formal transfer of after-acquired property amounts merely to a contract to assign it when it comes into existence, and is a contract within the meaning of the above-mentioned rule 3,(*c*) and would, therefore, be cancelled by bankruptcy before the property came into existence.

By the Bankruptcy Act, 1883(*d*) (46 & 47 Vict. c. 52), it is enacted by section 4 that a debtor commits an act of bankruptcy in each of the following cases ;—

(*a.*) If in England or elsewhere he makes a conveyance or assignment of his property to a

(*a*) *Re Andrew's Trusts*, 7 Ch. D. 635.

(*b*) *Re Gould*, 19 Q. B. D. 92.

(*c*) See *Collyer* v. *Isaacs*, 19 Ch. D. 342 ; *Joseph* v. *Lyons*, 15 Q. B. D. 280.

(*d*) This Act does not apply to Scotland or Ireland. See section 2.

trustee or trustees for the benefit of his creditors generally:

(*b.*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or any part thereof:

(*c.*) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt:

(*d.*) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England or departs from his dwelling-house, or otherwise absents himself, or begins to keep house:

(*e.*) If execution has been levied by seizure of his goods under process in an action in any court, or in any civil proceedings in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days: Provided that where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days.(*e*)

(*e*) This clause was enacted by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1, in substitution of the old clause (*e*) in the Bankruptcy Act, 1883.

(*f.*) If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.

(*g.*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or by leave of the court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained:

(*h.*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

By section 5, subject to the conditions specified in the Act, if a debtor commits an act of bankruptcy, the court may, on a bankruptcy petition being presented, either by a creditor or by the debtor, make an order, in the Act called a receiving order, for the protection of the estate.

By section 6 (1.), a creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

(*a.*) The debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds ; and

(*b.*) The debt is a liquidated sum, payable either immediately or at some certain future time ; and

(*c.*) The act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition ; and

(*d.*) The debtor is domiciled in England, or within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.

In the notes of Mr. W. J. Smith to *Twyne's Case*(*a*) three rules are stated, by reference to which it may be determined how far an assignment is fraudulent and an act of bankruptcy under the Bankruptcy Act, although it may happen to be unimpeachable by creditors under the statute 13 Eliz. c. 5.

(1.) Any transfer, which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent, and an act of bankruptcy under the Bankruptcy Act,(*b*) —and void as against the assignees upon an insolvency.

(*a*) 1 Smith's Leading Cases, 26 (9th edit.). This note is not contained in the latest edition, *i.e.*, the 10th. And see the judgment of PARKE, B., in *Young* v. *Waud*, 8 Exch. 221, 234.

(*b*) *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531 ; see the judgment of PARKE, B., in *Billiter* v. *Young*, 8 H. L. Cas. 682.

(2.) Any conveyance to a creditor by [a debtor] of his whole property, or of the whole with an exception merely nominal, in consideration of a *bygone and pre-existing debt*, though not fraudulent within the statute of Elizabeth,(*a*) is fraudulent under the Bankruptcy Act, and an act of bankruptcy.(*b*)

(3.) A transfer by [a debtor] of part of his property to a creditor, in consideration of a bygone and pre-existing debt, though not fraudulent within the statute of Elizabeth,(*c*) is fraudulent and an act of bankruptcy under the Bankruptcy Act, if made *voluntarily and in contemplation of bankruptcy*, or if it otherwise have the effect of defeating or delaying creditors.(*d*)

By section 48 of the Bankruptcy Act, 1883, which will be alluded to presently, every transfer of property by a debtor to a creditor by way of fraudulent preference is expressly made void against the trustee in bankruptcy, in the event of a debtor becoming bankrupt within three months after the date of such transfer; except as regards persons making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

Assignments which are fraudulent under the statute of Elizabeth have been sufficiently considered in the foregoing pages. It is proposed here to make a few remarks upon the 2nd and 3rd of the foregoing rules.

(*a*) See *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Ex parte Games*; *Re Bamford*, 12 Ch. D. 314.

(*b*) See *Evans* v. *Jones*, 3 H. & C. 423; *Graham* v. *Chapman*, 14 C. B. 85; *Ex parte Hauxwell*, 23 Ch. D. 636; *Ex parte Reed*, L. R. 14 Eq. 586; *Ex parte Norton*, L. R. 16 Eq. 397.

(*c*) See *Penhall* v. *Elwin*, 1 Sm. & Giff. 258.

(*d*) *Smith* v. *Cannan*, 2 E. & B. 35; *Young* v. *Fletcher*, 3 H. & C. 732; *Bills* v. *Smith*, 34 L. J. Q. B. 68.

With the passing remark that dispositions of property, which are fraudulent under the statute 13 Eliz. c. 5, are necessarily void under the Bankruptcy Act; but, on the other hand, the considaration for a deed may be perfectly good under the statute of Elizabeth, but not so under the Bankruptcy Act.(*e*)

(1.) As to assignments by a debtor of the whole of his property in discharge of pre-existing liabilities.

The assignment by a debtor of *all* his estate and effects in trust for *all* his creditors is an assignment of his solvency, and an act of bankruptcy, although no actual fraud was intended;(*f*) for, unless all the creditors assent to the deed, the property is put into a different course of distribution from what the bankruptcy laws direct.(*g*) *A fortiori* an assignment by a debtor of all his estate and effects will be void, if it is made for the benefit of some favoured few or of one particular individual amongst his creditors.(*h*)

(*e*) *Ex parte Games; Re Bamford, supra,* at p. 325.

(*f*) *Siebert* v. *Spooner,* 1 M. & W. 714; *Hooper* v. *Smith,* 1 W. B. 441; *Lindon* v. *Sharp,* 6 M. & G. 895; *Oriental Bank Corporation* v. *Coleman,* 30 L. J. Ch. 635. An assignment by a debtor of all his property in consideration of past debts will be unimpeachable, if the transaction is proved to have been without fraud in fact, and the debtor is made a bankrupt on his own petition; because the title of the trustee under such a bankruptcy does not relate back to the time when the assignment took place. *Jones* v. *Harber,* L. R. 6 Q. B. 77.

(*g*) *Stewart* v. *Moody,* 1 C. M. & R. 777; *Kettle* v. *Hammond,* Cooke, B. L. 106; *Ex parte Cohen,* L. R. 7 Ch. 20; *Ex parte Stevens,* L. R. 20 Eq. 786; *In re Jackson; Ex parte Hall,* 4 Ch. D. 682.

(*h*) *Butcher* v. *Easto,* 1 Dougl. 295. The same principles of law apply to assignments by partnerships of the whole of their

The same result will follow from an assignment by a person to his creditors of the whole of his property with the exception of a small and almost nominal portion of it. In *Ex parte Wensley*,(*a*) a trader in insolvent circumstances by a deed, which recited that he was unable to pay his debts in full, conveyed the principal part of his property to trustees upon trust to sell, and after paying his solicitor and accountant their professional costs, charges, and expenses, to divide the proceeds rateably amongst such of his creditors as should execute the deed. This was held to be an act of bankruptcy.(*b*)

An assignment by a debtor of all his property in consideration of a substantial present or future advance, either of money or goods, stands on the same footing as an assignment of all with a substantial exception, and is not an act of bankruptcy.(*c*) Such an assignment will be good, although it comprises not only all the present

property in consideration of pre-existing debts. *Echart* v. *Wilson*, 8 T. R. 140.

(*a*) 1 De G. J. & S., Bank. App. 49 ; *Ex parte Bland*, 6 De G. M. & G. 757 ; *Ex parte Roper*, 26 L. T. 186 ; *Worsley* v. *De Mattos*, 1 Burr. 467 ; *Wilson* v. *Day*, 2 Burr. 827 ; *Compton* v. *Bedford*, 1 W. B. 362 ; *Law* v. *Skinner*, 2 W. B. 996 ; *Young* v. *Fletcher*, 4 F. & F. 1081 ; *Ex parte Foxley*, L. R. 3 Ch. 515 ; *Ex parte Lilburne*, 12 L. T. (N.S.) 209.

(*b*) See *Ponsford* v. *Walton*, L. R. 3 C. P. 167.

(*c*) *Ex parte Zwilchenbart*, 3 M., D. & De G. 671 ; S. C. on appeal, nom. *Ex parte Marshall*, De Gex. 273 ; *Leake* v. *Young*, 5 E. & B. 955 ; *Baskett* v. *Cafe*, 4 De G. & S. 388 ; *White* v. *Bartlett*, 9 Bing. 378 ; *Cook* v. *Caldecott*, M. & M. 522 ; *Harwood* v. *Bartlett*, 6 B. N. C. 61 ; *Baxter* v. *Prichard*, 1 A. & E. 456 ; *Rose* v. *Haycock*, 1 A. & E. 460 ; *Linton* v. *Bartlett*, 3 Wilson, 47 ; *Manton* v. *Moore*, 7 T. R. 67 ; *Lee* v. *Hart*, 10 Exch. 555 ; 11 Exch. 880, S. C. ; *Martin* v. *Willyams*, 20 L. T. (N.S.) 350 ; *Kevan* v. *Mawson*, 19 W. R. 1145.

but also all the future acquired property of the debtor, so long as he really gets the benefit of the money or goods advanced, or of the excepted property, as the case may be.(*d*) And even if a deed assigning the whole of a debtor's property both present and future, in consideration of an advance, is framed in such a way as to give the assignee a right to retake the money advanced or the goods purchased with it, the transaction will not necessarily constitute an act of bankruptcy.(*e*)

It was at one time considered that an assignment by a debtor of the whole of his property was invalid if the consideration consisted partly of an antecedent debt, although a fresh advance was made at the time, or future advances were stipulated for; but it is now decided by several cases that, where the consideration for an assignment consists of a past debt and a present advance, the transaction is not necessarily an act of bankruptcy, because the advance, whether it consists of money or goods, may be the means of enabling the debtor to continue his trade, and may therefore prove beneficial to the creditors.(*f*) It is a question for the

(*d*) *Lomax* v. *Burton*, L. R. 6 C. P. 107; *Hutton* v. *Crutwell*, 1 E. & B. 15; *Hope* v. *Hayley*, 5 E. & B. 820; *In re Tetley* (1896), W. N. 86 (2).

(*e*) See *Ex parte Hauxwell; Re Hemingway*, 23 Ch. D. 626; *Harris* v. *Ricketts*, 28 L. J. Ex. 197; *Hutton* v. *Crutwell*, 22 L. J. Q. B. 78.

(*f*) *Pennell* v. *Reynolds*, 11 C. B. (N.S.) 709; *Mercer* v. *Peterson*, L. R. 3 Exch. 104; *Lomax* v. *Burton*, 6 L. R. C. P. 107; *Hutton* v. *Crutwell*, 1 E. & B. 15; *In re Colemere*, L. R. 1 Ch. App. 128; *Bew* v. *Bill*, 16 W. R. 760; *In re Dawson*, 16 W. R. 424; *Ex parte Gass*, 2 Ir. Rep. Eq. 284; *Allen* v. *Bonnett*, L. R. 5 Ch. 577; *Bell* v. *Simpson*, 2 H. & N. 410, overruling *Ex parte Cottrell*, 1 L. T. (N.S.) 465; *Ex parte Fisher; In re Ash*, L. R. 7 Ch. 636; *Heath* v. *Cochrane*, 46 L. J. Q. B. 727; *Ex parte Kilner*;

jury whether, taking into consideration all the circumstances of the case, the effect of the assignment is to delay and defraud creditors.(*a*)

An assignment by a debtor to secure a sum which has been paid to one of his creditors in discharge of his debt is an assignment in consideration of an original advance, and will be supported, if there is no collusion or fraud, against the rest of the creditors, although they obviously receive no benefit by the transaction.(*b*)

An assignment of all a man's goods and effects in consideration of bygone debts will not be less an act of bankruptcy because it was made in consequence of pressure put upon him by his creditors, or even because it was made while he was under arrest for debt.(*c*) Neither will such an assignment be protected from being an act of bankruptcy by the fact that it was conditioned to be void if the trustees of the deed should think fit, or if a commission of bankruptcy should issue, or if all the creditors above a certain sum should not sign within a given period ;(*d*) but an assignment by a

In re Barker, 13 Ch. D. 245 ; *Ex parte Burton*, 13 Ch. D. 102 ; *Ex parte Dann*, 17 Ch. D. 26 ; *Ex parte Wilkinson*, 22 Ch. D. 788.

(*a*) See *Lacon* v. *Liffen*, 32 L. J. Ch. 315 ; *Frazer* v. *Levy*, 6 H. & N. 16 ; *Lindon* v. *Sharp*, 6 M. & G. 895 ; *Ward* v. *Clarke*, M. & M. 497 ; *Ex parte Holloway*, 1 Bank. & Insol. Rep. 244 ; *Devas* v. *Venables*, 3 Bing. N. C. 400 ; *Cash* v. *Young*, 2 B. & C. 413 ; *Arnell* v. *Bean*, 8 Bing. 87 ; *Penson* v. *Moon*, 15 L. T. (N.S.) 444 ; *The Heart of Oak*, 39 L. J. Adm. 15.

(*b*) *Whitmore* v. *Claridge*, 33 L. J. Q. B. 87 ; *Hutton* v. *Crutwell*, 1 E. & B. 15 ; *Lomax* v. *Burton*, 6 L. R. C. P. 107.

(*c*) *Newton* v. *Chantler*, 7 East, 138 ; *Young* v. *Fletcher*, 3 H. & C. 732 ; *Ex parte Wensley*, 1 De G. J. & S. 273 ; *Ponsford* v. *Walton*, L. R. 3 C. P. 167 ; *Jones* v. *Harber*, 6 L. R. Q. B. 77.

(*d*) *Tappenden* v. *Burgess*, 4 East, 230 ; *Turner* v. *Hardcastle*, 11

debtor of all his effects at a certain place is not an act of bankruptcy, unless it be shown that he has no other property.(*e*)

A conveyance by a trader delaying his *general* creditors is an act of bankruptcy, although the rights of the *trade* creditors are not disturbed. And as a debtor by giving up the control over the whole of his property put it out of his present power to satisfy his creditors, the deed will not be the less treated as fraudulent because there may happen ultimately to be a substantial surplus remaining after his debts are discharged.(*f*)

A conveyance by a debtor of all his property in trust for his creditors by a deed intended to have immediate operation is an act of bankruptcy sufficient to support a petition of bankruptcy against him, although the deed was not executed by any of the creditors, was never acted on, and never passed out of the possession of the bankrupt.(*g*) And if an assignment by several partners of all their effects is fraudulent, and is intended to take effect immediately, it may operate as an act of bankruptcy on the part of one of the firm, who alone executes the deed, unless it can be shown that the instrument was delivered merely as an escrow, and was not intended

C. B. (N.S.) 683 ; *Dutton* v. *Morrison*, 17 Ves. 193 ; *Back* v. *Gooch*, 4 Camp. 232 ; and see *Ex parte Egyptian Commercial Trading Company*, L. R. 4 Ch. 125.

(*e*) *Chase* v. *Goble*, 2 M. & Gr. 930 ; *Ex parte Sparrow*, 2 De G. M. & G. 907.

(*f*) *Smith* v. *Cannan*, 2 E. & B. 35.

(*g*) *Botcherby* v. *Lancaster*, 1 A. & E. 77 ; *Pulling* v. *Tucker*, 4 B. & Ald. 382 ; *Grugeon* v. *Gerrard*, 4 Y. & C. 119, 130 ; *Doe* d. *Garnons* v. *Knight*, 5 B. & C. 671.

to have any operation until it was executed by all the partners.(*a*)

An assignment of the whole of his property by a man who is only a surety will be as much an act of bankruptcy as if he were the principal debtor. "Every surety," said Lord Justice TURNER, in *Goodricke* v. *Taylor*,(*b*) "must be taken to contemplate that he may be called upon to pay the debts for which he is surety, and he can no more be justified in placing the whole of his property out of the reach of liability to pay them than if he was principal debtor. . . . Possibly in some cases in which the question of *intent* may be doubtful, the fact of the debtor being a surety only may be material, but I do not well see how it can be so where the whole property is assigned, and the law imputes the intent as a necessary consequence of the act."

But a mere deed of arrangement whereby the debtor, with the view of raising money for the purpose of discharging his liabilities, conveys the whole of his property to trustees for the purpose of conversion, is not an act of bankruptcy; so long as the debtor himself retains full control over the property, and over the money produced by the sale. Such an arrangement, so far from being an attempt to defraud creditors, is evidently entered into by the debtor in order that property inconveniently situated may be converted into ready money, and his debts be the more easily discharged.(*c*) A deed of arrangement between the debtor

(*a*) *Bowker* v. *Burdekin*, 11 M. & W. 128; *Dutton* v. *Morrison*, 17 Ves. 193; see *Turner* v. *Hardcastle*, 11 C. B. (N.S.) 683.

(*b*) 2 De G. F. & J. 135, 141.

(*c*) *Berney* v. *Davison*, 1 B. & B. 408; *Berney* v. *Vyner*, 1 B. & B.

and one particular class of his creditors has been supported on similar grounds. Thus, in *Abbot* v. *Burbage*,(*d*) one of two traders in partnership conveyed his separate estate to trustees in trust for the joint creditors of the firm. The joint creditors agreed that, upon being paid 4*s*. 6*d*. in the pound by instalments, they would execute a general release to the partnership ; and further, that they would take no proceedings to recover their debts until the third instalment became due. The partners in the meanwhile were to continue in possession of their stock in trade, and to carry on their business, with the view of retrieving their fortunes. This was held not to be an act of bankruptcy ; but a mere deed of arrangement, whereby the separate creditors, so far from being delayed, were benefited by the forbearance of the joint creditors.

A deed conveying the whole of a debtor's property to a particular creditor cannot be impeached, if there was no petitioning creditor's debt in existence at the time the instrument was executed.(*e*) By section 43 of the Bankruptcy Act, 1883, it is declared that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being completed on which a receiving order is made against him ; or if the bankrupt is proved to

482 ; *Robinson* v. *Cartwright*, 1 M. & A. 1 ; *Greenwood* v. *Churchill*, 1 M. & K. 546 ; and see *Isitt* v. *Beeston*, L. R. 4 Exch. 159 ; *Cotton* v. *James*, 1 Moo. & Mal. 273.

(*d*) 2 Bing. N. C. 444.

(*e*) *Per* BYLES, J., in *Topping* v. *Keysell*, 16 C. B. (N.S.) 258, 287 ; citing *Stevenson* v. *Newnham*, 13 C. B. 285 ; *Nicholson* v. *Gooch*, 5 E. & B. 999 ; *Monk* v. *Sharpe*, 2 H. & N. 540 ; *Shrubsole* v. *Sussams*, 16 C. B. (N.S.) 452 ; and see *Ex parte Hayward*, L. R. 6 Ch. 546.

have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

(2.) As to the effect of an assignment by the bankrupt of part of his property in discharge of antecedent debts.

It would appear that though the necessary effect of a conveyance of the whole of a debtor's property for a past debt is to defeat or delay creditors, and, therefore, proof of the debtor's fraudulent intention is not required as the law presumes it; still a conveyance of only part of the debtor's property for a past debt is not, on the face of it, fraudulent, and can only be impeached if it comes within section 48 of the Bankruptcy Act, for which purpose it is necessary to prove—

1st. That it was made with the dominant view of giving that particular creditor a preference.

2nd. That the debtor was unable to pay his debts as they became due out of his own money.

3rd. That the debtor has been adjudicated a bankrupt on a bankruptcy petition presented within three months after the date of the transaction.

The question of preference or priority amongst creditors does not come within the statute of 13 Eliz. c. 5, at all, (*a*) for under that statute there is nothing to

(*a*) *Middleton* v. *Pollock*, 2 Ch. D. 104; *Ex parte Games*; *In re Bamford*, 12 Ch. D. 314.

prevent a man from paying one creditor in preference to another, although even he may do so with the express intention of defeating his other creditors.(*b*)

Under the law as it existed previously to the Bankruptcy Act, 1869, an assignment by a debtor of part of his property in consideration of an antecedent debt, if made voluntarily and in contemplation of bankruptcy, was held to be a fraudulent preference of the particular creditor to whom the transfer was made.(*c*) Such a transaction, whether it was an act of bankruptcy or not, was voidable at the election of the assignees in bankruptcy as being contrary to the spirit of the bankruptcy laws.(*d*)

By section 48 of the Bankruptcy Act, 1883, every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred,

(*b*) *Alton* v. *Harrison*, L. R. 4 Ch. 622 ; *Ex parte Games, supra*.

(*c*) *Bevan* v. *Nunn*, 9 Bing. 107 ; *Harman* v. *Fisher*, Cowper, 117 ; *Ex parte Scudamore*, 3 Ves. 85 ; *Alderson* v. *Temple*, 4 Burr. 2240 ; *Rust* v. *Cowper*, Cowper, 629 ; *Devon* v. *Watts*, 1 Dougl. 86 ; *Linton* v. *Bartlett*, 3 Wilson, 47 ; *Round* v. *Byde*, Cooke, B. L. 110 ; *Gibbins* v. *Phillips*, 7 B. & C. 529 ; *Mather* v. *Frazer*, 2 K. & J. 536 ; *Carr* v. *Burdiss*, 1 C. M. & R. 443 ; *Bourne* v. *Graham*, 2 Jur. (N.S.) 1225 ; *In re Beverly*, 4 Ir. Eq. Rep. 198. See *Miller* v. *Barlow*, L. R. 3 P. C. 733, 749, where it is said, that there is nothing fraudulent or improper in an insolvent firm parting with or putting an end to a current speculation, the result of which is still uncertain, on the best terms they are able ; and that the rescission and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one creditor to others after a debt has been incurred.

(*d*) *Heilbut* v. *Nevill*, L. R. 5 C. P. 478 ; *Marks* v. *Feldman*, L. R. 5 Q. B. 275 ; see *Alderson* v. *Temple*, 4 Burr. 2235 ; *Morgan* v. *Brundrett*, 5 B. & Ad. 289 ; *Stevenson* v. *Newnham*, 13 C. B. 285 ; *Young* v. *Billiter*, 8 H. L. C. 682.

and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor *with a view*(*a*) of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.

By sub-section (2) of this section it is provided that this section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.(*b*)

In order that a payment or transfer of property should amount to a fraudulent preference within section 48, it is essential that it should have been made by him *with a view of giving a preference* to the creditor to whom it was made; it is not sufficient that the creditor was in fact preferred. The words "with a view" means with intent.(*c*) The court, must, therefore, in each case consider as a question of fact what was the real or dominant motive of the bankrupt in making the payment or transfer, and if the court comes to the conclusion that the bankrupt's real motive was, *e.g.*, to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference. In other words, the court has to look for the substantial

(*a*) *Ex parte Hill*, 23 Ch. D. 695; *Ex parte Taylor; Re Goldsmid*, 18 Q. B. D. 295; *Ex parte Suffolk*; *Re Fletcher*, 9 Morrell, 8, p. 12.

(*b*) See *Ex parte Bolland; In re Cherry*, L. R. 7 Ch. 24; *Ex parte Blackburn*, L. R. 12 Eq. 358. The remarks in these cases have reference to the Bankruptcy Act, 1869, but are still applicable.

(*c*) *Ex parte Taylor*; *Re Goldsmid*, 18 Q. B. D. 295; but see *Ex parte Ball*, 35 W. R. 264.

motive of the debtor. If the substantial motive is to prefer the creditor the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference. It is also essential that the relation of debtor and creditor should have existed between the parties at the time when the payment or transfer was made, in order that the section should apply. Consequently, a voluntary payment or conveyance to make good a breach of trust committed by the bankrupt is not within this section at all.(*d*)

If a debtor prefers his surety, who goes with the money to the creditor and discharges the liability when it becomes due, this is not a fraudulent preference of the creditor by the debtor.(*e*) In *Belcher* v. *Jones*,(*f*) some bankers, being about to stop payment, communicated the fact to a particular customer, in order to give him a preference, and that he might withdraw his private balance from the bank. The customer took advantage of this information, and not only drew out his own money, but procured the account of a company, of which he was a managing director, to be drawn out as well. This was held not to be a fraudulent preference of the company.

An assignment cannot be treated as a fraudulent preference if it was made in consequence of pressure put upon the debtor by the creditor, and no change in this respect is made by section 48 of the Bankruptcy Act, 1883. To constitute a preference two things must

(*d*) See *Taylor, Ex parte*, 18 Q. B. D. 295; *Ex parte Stubbins*, 17 Ch. D. 58; *Sinclair* v. *Wilson*, 20 Beav. 324; see, however, *Ex parte Ball*; *Re Hutchinson*, 35 L. R. 264, and the M. R.'s judgment in *In re Durham*, 16 Ch. D. 637.

(*e*) *Abbot* v. *Pomfret*, 1 B. N. C. 462; *Re Mills*, 5 Morrell, 55.

(*f*) 2 M. & W. 258.

concur :—1st. The act of preference must be voluntary on the part of the debtor ; and 2nd, it must have been done by him when in such a state of insolvency as that it may or must be inferred that bankruptcy was then in his contemplation.(*a*) In order to constitute pressure it is not necessary that legal process should have been resorted to or even threatened by the creditor.(*b*) A *bonâ fide* demand on his part will justify payment of his claim by the debtor.(*c*) In *Belcher* v. *Prittie*,(*d*) a trader, upon his son's request, conveyed certain real estate to the trustees of his son's marriage settlement as a security for and in discharge of a bond debt of 12,000*l*., which he owed his son, and which had been settled upon the son's wife on his marriage. The jury found that the conveyance was not voluntary, although there was no importunity or pressure ; and PARK, J., said : "Urgency depends upon the station in which each party stands, and a very little act on the part of a son would be as strong towards a father as if a stranger had threatened to arrest him."

(*a*) See *Ex parte Tempest, In re Craven*, L. R. 6 Ch. 70 ; L. R. 10 Eq. 648 ; *Ex parte Wreford*, 24 L. T. (N.S.) 638 ; *Ex parte Huxtable*, 2 Ch. D. 54 ; *Ex parte Topham*, L. R. 8 Ch. 614 ; *Re Glanville*, 2 Morrell, 71 ; *Ex parte Hall*, 19 Ch. D. 580.

(*b*) *Reynard* v. *Robinson*, 9 Bing. 717 ; *Reed* v. *Ayton*, Holt, N. P. 503 ; *Pennell* v. *Heading*, 2 F. & F. 704 ; *Shrubsole* v. *Sussams*, 16 C. B. (N.S.) 432 ; *Strachan* v. *Barton*, 11 Exch. 647 ; *Harries* v. *Lloyd*, 6 Beav. 426 ; *Harris* v. *Wanklen*, 5 W. R. 51 ; *Smith* v. *Payne*, 6 T. R. 152 ; *Van Casteel* v. *Bowker*, 2 Exch. 691 ; *Morgan* v. *Horseman*, 3 Taunt. 241 ; *Hale* v *Allnutt*, 18 C. B. 505 ; but see *Stanger* v. *Wilkins*, 19 Beav. 626.

(*c*) *Mogg* v. *Baker*, 4 M. & W. 348 ; *Ex parte Whitby*, Mon. & Ch. 671.

(*d*) 10 Bing, 408 ; *Bannatyne* v. *Leader*, 10 Simon, 350 ; *Ford* v. *Olden*, L. R. 3 Eq. 461 ; *Payne* v. *Hornby*, 25 Beav. 280.

And it seems that if the debtor executes an assignment to a particular creditor before any demand has been made from a mere apprehension, however groundless it may be, that legal process, whether civil or criminal, is about to be enforced against him to recover the debt, the assignment cannot be treated as voluntary.(*e*) But in *Ex parte The Hibernian Bank*,(*f*) traders in partnership had forged acceptances to several bills of exchange which had been discounted by the bank. Shortly afterwards the traders became hopelessly insolvent, and one of the partners, seeing that if they were brought before the Bankruptcy Court, the forgeries would be discovered, went to the bank, and paid off the bills, which he afterwards destroyed. The bankers were not aware that the bills were forgeries, nor was any communication made by them to the debtors for the purpose of obtaining payment. It was held that the mere apprehension of a criminal prosecution for forgery could not protect the payment from being considered as voluntary, inasmuch as the bankrupts were uninfluenced by any pressure on the part of their creditors, and that the transaction was, therefore, a fraudulent preference of the bank, and void.

The circumstances that the period for the payment of the debt had not arrived, and that, therefore, the bill or other instrument could not have been sued on at the time the pressure was exercised by the creditor is merely a fact to be taken into consideration by the jury in

(*e*) *Thompson* v. *Freeman*, 1 T. R. 155; *De Tastet* v. *Carroll*, 1 Starkie, 88; and see same case, nom. *Ex parte De Tastet*, Mont. 138, 153; *Dixon* v. *Baldwen*, 5 East, 175.

(*f*) 14 Ir. Ch. Rep. 113; see *Assignees of Taylor* v. *Thompson*, 4 Ir. Rep. C. L. 129.

determining the question of fraudulent preference.(*a*) In *Arbouin* v. *Hanbury*,(*b*) a creditor by urgency and importunity obtained a transfer of property to cover his liabilities upon bills which were not then due, and which he had discounted. This assignment was held not to be a fraudulent preference, although it was made on the eve of bankruptcy.

If the assignment was made in consequence of a request by a surety of the debtor, it will be protected as much as if it was made at the solicitation of the creditor himself. In *Edwards* v. *Glyn*,(*c*) bankers, who were expecting a run upon their bank, prevailed upon some friends to sign a guarantee, which was given on the express understanding that it should not be used unless the bankers could clearly see that it would carry them over the crisis. The defendants, who were not aware of the arrangement with the sureties, advanced 3,000*l.* on the security of the guarantee. The case of the bankers being hopeless, they discussed the propriety of returning the 3,000*l.*, and eventually determined on doing so, being greatly influenced by a letter which they received from one of the sureties pressing them not to keep the money. The bankers having become bankrupt, their assignees endeavoured to recover the 3,000*l.* from the defendants; but the Court of Queen's Bench, disallowing the claim of the assignees, held that the re-assignment of the money could not be treated as a fraudulent preference because of the influence the sure-

(*a*) *Strachan* v. *Barton*, 11 Exch. 647.

(*b*) Holt, N. P. 575; *Hartshorn* v. *Slodden*, 2 B. & P. 582; *Singleton* v. *Butler*, 2 B. & P. 283; *Ex parte Seals*, 10 L. T. (N.S.) 315.

(*c*) 28 L. J. Q. B. 350, S. C.

ties had exercised over the minds of the bankrupts. Lord CAMPBELL said: "A request by a surety that the money for the payment of which he is ultimately responsible may be paid over by the debtor to the creditor prevents such payment by the debtor from being voluntary just as much as a request by the creditor himself."

The mere fact that pressure was exercised on the part of the creditor is not sufficient to protect a payment or assignment, which cannot be proved to have been made *in consequence of the urgency of the creditor*, but which was in reality a voluntary act on the part of the debtor.(*d*) On the other hand, however great may be the desire on the part of the debtor to prefer a particular creditor, yet the assignment cannot be looked upon as a fraudulent preference if the debtor was not a free agent at the time the assignment was made.(*e*) And, therefore, where a debtor intending to give a voluntary preference to a particular creditor sent some cheques to him, and before they were delivered the creditor called on the debtor and demanded payment, it was held that the transaction could not be impeached as fraudulent, inasmuch as the intention to give the preference was not consummated at the time the pressure was exerted.(*f*)

An assignment which has been executed by the

(*d*) *Cook* v. *Rogers*, 7 Bing. 438, 449; *Kinnear* v. *Johnson*, 2 F. & F. 753, 756; *Thornton* v. *Hargreaves*, 7 East, 544; *Harman* v. *Fisher*, Cowper, 117; *Crosby* v. *Crouch*, 11 East, 256; *Scott* v. *Thomas*, 6 C. & P. 611.

(*e*) *Graham* v. *Candy*, 3 F. & F. 206; *Brown* v. *Kempton*, 19 L. R. C. P. 169; *Crosby* v. *Crouch*, 11 East, 256.

(*f*) *Bayley* v. *Ballard*, 1 Camp. 416: *Ex parte Majoribanks*, De Gex, 466; *Van Casteel* v. *Bowker*, 2 Exch. 691, 698.

debtor to his creditor in consequence of importunity and pressure will not be the less treated as a fraudulent preference because the creditor knew of the debtor's embarrassments. The creditor's knowledge would lead him to apply to the debtor for payment, and, as before shown, where there is anything to control the will of the debtor the assignment cannot be considered as voluntary.(*a*) On the other hand, if a transfer is a fraudulent preference it will not be protected by the fact that the creditor was in no way privy to the fraud.(*b*)

Where an assignment or payment is made in the ordinary course of business,(*c*) or in pursuance of a contract or engagement, it cannot be treated as a fraudulent preference, although there was no express demand on the part of the creditor.(*d*) And money paid by a debtor contemplating bankruptcy in discharge of a lien upon his property, or to his landlord in order to prevent a distress, cannot be recovered back by the trustee in bankruptcy.(*e*)

(*a*) *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Smith* v. *Tims*, 1 H. & C. 849; *Davidson* v. *Robinson*, 3 Jur. (N.S.) 791; *Blackburn* v. *Homan*, 19 W. R. 1078.

(*b*) *Smith* v. *Cannan*, 2 E. & B. 35; *Bourne* v. *Graham*, 2 Jur. (N.S.) 1225.

(*c*) *Ex parte Blackburn*, 12 L. R. Eq. 358.

(*d*) *Vacher* v. *Cocks*, 1 B. & Ald. 145, 152; *Bills* v. *Smith*, 6 B. & S. 314; *Toovey* v. *Milne*, 2 B. & Ald. 683; *Edwards* v. *Glyn*, 2 E. & E. 29; *Harris* v. *Ricketts*, 4 H. & N. 1; *Mercer* v. *Peterson*, L. R. 2 Exch. 304; L. R. 3 Exch. 104, S. C.; *Ex parte Foxley*, L. R. 3 Ch. 516; *Frith* v. *Forbes*, 4 De G. F. & J. 409; *Ex parte Field*, 13 Ch. D. 106; *Ex parte Kilner*, 13 Ch. D. 245; *Heath* v. *Cochrane*, 46 L. J. Q. B. 727.

(*e*) *Mavor* v. *Croome*, 1 Bing. 261; *Payne* v. *Hornby*, 25 Beav. 280; *Ex parte Dobson*, 2 M. D. & De G. 605; but see *Marshall* v. *Lambe*, 5 Q. B. 115.

As has been already shown, a levy by seizure of a debtor's goods is now, by section 4(*e*) of the Bankruptcy Act, 1883, as altered by section 1 of the Bankruptcy Act, 1890, an act of bankruptcy.

In *Woodhouse* v. *Murray*(*f*) execution was levied by seizure on the goods of a trader, and he, being then insolvent, in consideration of the withdrawal of the execution, assigned all his property to the judgment creditor, and ceased to trade. It was held that if the sheriff had proceeded to the sale, the creditors might have made the trader a bankrupt, and the proceeds would have been paid to the assignees under the bankruptcy. As the effect, therefore, of the arrangement between the execution debtor and the execution creditor was to withdraw the property from the general body of creditors, who were thus hindered and delayed, it was held that the transaction could not be supported.

It is decided in *Ex parte Anderson*,(*g*) that under the Bankruptcy Act, 1869, the Court of Bankruptcy has jurisdiction to grant in a summary way an injunction to restrain a person, not a party to the bankruptcy proceedings, from dealing with property alleged to have been fraudulently assigned before the bankruptcy, and that such an injunction may be granted *ex parte* on such a case being made as would induce the Court of Chancery to grant it upon bill filed to impeach the assignment. But the person obtaining such order must give an unqualified undertaking to be answerable for damages, not merely an undertaking to be answerable for damages out of the assets; and he must also give an undertaking

(*f*) L. R. 2 Q. B. 634; affirmed L. R. 4 Q. B. 27.

(*g*) L. R. 5 Ch. 473.

to institute within a limited time proceedings to set aside the alleged fraudulent assignment.(*a*)

By section 49 of the Bankruptcy Act, 1883, it is enacted that, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in the Act shall invalidate, in the case of a bankruptcy—

(1.) Any payment by the bankrupt to any of his creditors.

(2.) Any payment or delivery to the bankrupt.

(3.) Any conveyance or assignment by the bankrupt for valuable consideration.

(4.) Any contract, dealing or transaction by or with the bankrupt for valuable consideration.

Provided that both the following conditions are complied with—

(1.) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order ; and

(2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction, was made, executed or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

(*a*) *Vide* same case.

A demand of possession by the real owner of goods, sufficient to determine the reputed ownership of the bankrupt under the order and disposition clauses of the Bankruptcy Acts, was held to be a "dealing or transaction" within the meaning of section 133 of 12 & 13 Vict. c. 106.(*b*) In *Young* v. *Hope*,(*c*) a trader took possession of goods, agreeing to pay a certain sum, on non-payment of which on a certain day the owner might resume possession. The money not having been paid the owner sold them, after an act of bankruptcy, but before he had notice of the commission of it, and before a *fiat* had issued. This was held to be a "dealing or transaction," within 2 & 3 Vict. c. 29, and consequently to be protected. In *Ex parte Styan*,(*d*) a person deposited a policy of insurance as security for a debt, and subsequently became bankrupt. Notice of the deposit was given by the depositary to the insurance office before he was aware that any act of bankruptcy had been committed, and before *fiat*. This was held to be a "dealing or transaction" within 2 & 3 Vict. c. 29.

Section 49 extends to all contracts, express and implied, between the bankrupt and other parties, and therefore will protect a claim of general lien on such of the bankrupt's goods as come into the hands of the person entitled to the lien before the date of the order of adjudication, and before notice of an act of bankruptcy.(*e*)

(*b*) *Brewin* v. *Short*, 5 E. & B. 227; *Pariente* v. *Pennell*, 2 M. & R. 517; *Graham* v. *Furber*, 14 C. B. 134; *Krehl* v. *Great Central Gas Company*, L. R. 5 Exch. 289; *Hope* v. *Hayley*, 5 E. & B. 830.

(*c*) 2 Exch. 105.

(*d*) 2 M. D. & De G. 219; see *Webb's Policy*, 36 L. J. Ch. 341.

(*e*) *Bowman* v. *Malcolm*, 11 M. & W. 833. See further as to what is a contract or dealing, *Green* v. *Bradfield*, 1 C. & K.

Payments to a bankrupt under coercion of legal process are valid against the trustee in bankruptcy, although made after notice of an act of bankruptcy, if no adjudication has been actually pronounced. It would seem to be unnecessary that judgment should have been recovered in the action. However, payments enforced by actual arrest of the party sued will certainly be valid.(*a*)

By section 45 of the Bankruptcy Act, 1883, it is enacted—

(1.) Where a creditor has issued execution against the goods or lands of the debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution, or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2.) For the purposes of this Act an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt, and an execution against land is completed by seizure, or in the case of an equitable interest by the appointment of a receiver.

As the transactions mentioned in sections 45 and 49 of the Bankruptcy Act, 1883, are protected only where

449; *Green* v. *Steer*, 1 Q. B. 707; *Tatham* v. *Andree*, 9 Jur. (N.S.) 1019.

(*a*) *Foster* v. *Allanson*, 2 T. R. 478.

the party dealing with the bankrupt had no notice of the act of bankruptcy, the onus of showing that he had no notice lies upon the party claiming the benefit of the statute.(*b*) It is sufficient if the notice be in general terms without stating the nature of or circumstances attending the act of bankruptcy.(*c*) "Where an act of bankruptcy has been in fact committed, any communication which brings to the knowledge of the execution creditor before the sale the alleged fact that an act of bankruptcy has been committed, in a way which ought to induce him as a reasonable man to believe that the notification was true, is a sufficient notice."(*d*) But notice of a mere intention to commit an act of bankruptcy, unless followed by notice of an act of bankruptcy having actually taken place, is not a notice within the meaning of the Act.(*e*) Notice of an act of bankruptcy to a sheriff's officer is not notice to the execution creditor;(*f*) but notice to an attorney's agent is notice to the attorney himself and to his client.(*g*)

By section 47 of the Bankruptcy Act, 1883, any settlement of property, not being a settlement made before and in consideration of marriage, or made in

(*b*) *Pearson* v. *Graham*, 6 A. & E. 899; *Bowman* v. *Malcolm*, 11 M. & W. 843, *per* PARKE, B.

(*c*) *Ramsey* v. *Eaton*, 10 M. & W. 22; *Udall* v. *Walton*, 14 M. & W. 254; *Turner* v. *Hardcastle*, 11 C. B. (N.S.) 683; see *Conway* v. *Nall*, 1 C. B. 643.

(*d*) *Per* PARKE, B., *Hope* v. *Meek*, 10 Exch. 829; *Brewin* v. *Briscoe*, 2 E. & E. 131, 132, *per* CROMPTON, J.; *Evans* v. *Hallam*, L. R. 6 Q. B. 713; *Lucas* v. *Dicker*, 43 L. T. 492.

(*e*) *Ex parte Halifax*, 2 M. D. & De G. 544; *Ex parte Glyn*, 6 Jurist, 839.

(*f*) *Ramsey* v. *Eaton*, *supra*.

(*g*) *Brewin* v. *Briscoe*, *supra*; *Willis* v. *Bank of England*, 4 A. & E. 21.

favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in bankruptcy.

"Settlement" shall, for the purposes of this section, include any conveyance or transfer of property. The meaning of this last sentence is, that where money is settled as property it may be recovered by the trustee in the same way that property which is ordinarily the subject of a settlement might be. The transaction must be in the nature of a settlement, though it may be

effected by a conveyance or transfer. The end and purpose of the thing must be a settlement; that is, a disposition of property to be held for the enjoyment of some other person.(*a*)

The general effect of section 47 of the Bankruptcy Act, 1883, is that with regard to voluntary settlements made by persons who have become bankrupt within two years from the date of such settlement, such settlements being by the terms of the section absolutely void, the court is relieved from all questions of fraud, actual or constructive; and, further, where the settlor has become bankrupt within ten years from the date of the settlement the onus of proving the settlor's solvency at the date of the settlement is cast upon the beneficiares under the settlement who seek to support it.

Where a man made a voluntary settlement of an estate which was subject to a mortgage, and covenanted with the trustees of the settlement that he would pay the interest on the mortgage and, when required, would pay off the principal. His assets, exclusive of the mortgaged estate, being sufficient to pay his debts other than the mortgage debt, but not sufficient to pay both, and he afterwards became bankrupt, the settlement was held to be void, under section 91 (of the Act of 1869, which was the section which corresponds with section 47 of the Act of 1883), as against the trustee in bankruptcy.(*b*) A covenant by a trader in a settlement subject to the old Bankruptcy Act to settle all his after-acquired property, real and personal, is void, as against

(*a*) *In re Player; Ex parte Harvey*, 15 Q. B. D. 682; *Kensington* v. *Chantler*, 2 M. & S. 36; *Ex parte Shorland*, 7 Ves. 88; *Ex parte Skerratt*, 2 Rose, 384.

(*b*) *Ex parte Huxtable; In re Conibeer*, 2 Ch. D. 54.

the creditors.(*a*) The section, however, does not apply to a common covenant to pay a sum of money to trustees of a settlement; the intention of the Legislature appears to have been to prevent a settlement of property expected to accrue at a future time, but in which the settlor had no present interest.(*b*) A covenant by a man to settle whatever he might receive under the terms of the will of his father under a power of appointment given by his mother, or in default of appointment, is valid as against the trustee in bankruptcy, because the covenantor had at the date of the settlement an interest under the will.(*c*) A settlement is void under the Act as against creditors if it is evidently executed with the view of putting the settlor's property out of the reach of his creditors in case he should fail in the business he is about to enter into,(*d*) and such a settlement is void under this section against the trustee in bankruptcy.

In determining whether a trader who had executed a voluntary settlement was within the meaning of section 91 of the Act of 1869 "at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement," the value of the implements of his trade and of the goodwill of his business is not, if he was intending to continue his business, to be taken into account, or the value should be such as it would realize at a forced sale. It is also essential that the settlor should be able to pay his debts

(*a*) *Ex parte Bolland*, L. R. 17 Eq. 115.

(*b*) *Ex parte Bishop; In re Tonnies*, L. R. 8 Ch. 718.

(*c*) *In re Andrews' Trust*, 7 Ch. D. 635.

(*d*) *Mackay* v. *Douglas*, 14 Eq. 106; *Crossley* v. *Elworthy*, 12 Eq. 158.

in the way in which he is proposing to pay them, that is, in the ordinary course of his business, if he is proposing to continue it.(*e*)

The word "purchaser" in this section means "buyer" in the ordinary commercial sense of the word, not purchaser in the legal sense of the word; therefore, the trustee of a post-nuptial settlement of leaseholds for the benefit of the settlor's wife and children is not a purchase in good faith and for valuable consideration.(*f*)

Section 47 of the Bankruptcy Act, 1883, is not retrospective (*i.e.*, does not apply to settlements executed before the Act came into force) so far as its provisions differ from those of section 91 of the Bankruptcy Act, 1869. Therefore, it does not apply to a settlement executed by a *non trader* before the Act came into operation; and the provisions, that a settlement executed within ten years before the bankruptcy of the settlor shall be void as against the trustee in bankruptcy unless the parties claiming under the settlement can prove that the interest of the settlor in the settled property had passed to the trustees of the settlement on the execution thereof, does not apply to any settlements executed before the Act came into operation (viz., 1st January, 1884). But it was held by ESHER, M.R., and LOPES, J., that section 47 is retrospective so far as it is a re-enactment of section 91 of the Bankruptcy Act, 1889, though FRY, J., doubted this.(*g*)

Trustees of a settlement originally valid, but which becomes void on the bankruptcy of the settlor, are

(*e*) *Ex parte Russell; In re Butterworth*, 19 Ch. D. 588.

(*f*) *Ex parte Hillman; In re Pumphrey*, 10 Ch. D. 622; *Hance* v. *Harding*, 20 Q. B. D. 732.

(*g*) *Ex parte Todd; In re Ashcroft*, 19 Q. B. D. 186.

entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees.(*a*) In estimating whether a settlor was able to pay all his debts without the aid of the property settled the settlor's life interest in the settled property should be taken into account.(*b*)

A gift of money to a son for the purpose of enabling him to commence carrying on a business on his own account is not "a settlement of property" within the meaning of section 47.(*c*)

A voluntary settlement which has been set aside under section 47 of the Act, as being void against the trustee in bankruptcy, is void for all purposes, and does not entitle the trustee in bankruptcy to stand in the place of the beneficiaries under the avoided settlement, or give him, on behalf of the unsecured creditors, any priority over mortgagees and incumbrancers subsequent to the settlement. The effect of such an order of avoidance is to accelerate subsequent incumbrances generally.(*d*)

In order to constitute "a purchaser in good faith" within this section of the Act it is sufficient if there is good faith on the part of the purchaser; it is not necessary that both parties to the transaction should act

(*a*) *In re Holden; Ex parte Official Receiver*, 20 Q. B. D. 43.

(*b*) *In re Lownes*, 18 Q. B. D. 677.

(*c*) *In re Player; Ex parte Harvey*, 15 Q. B. D. 682. See also *Ex parte Shorland*, 7 Ves. 88; *Kensington* v. *Chantler*, 2 M. & S. 36; *Ex parte Skerratt*, 2 Rose, 384, decided on the corresponding sections of the earlier Bankruptcy Acts.

(*d*) *Sanguinetti* v. *Stuckey's Banking Company* [1895], 1 Ch. 176; *In re Farnham* [1895], 2 Ch. 799.

in good faith (see *Mackintosh* v. *Pogose*).(*e*) In this case a woman married in 1883, possessed of separate property, after the marriage allowed that property to pass into the husband's hands, but not as a gift nor as a loan for the purposes of his trade. The husband having applied part of the property to his own use, settled the residue of it, together with other property of his own, upon trusts under which he took a life interest, with a proviso for the cesser thereof in the event of his bankruptcy, which event happened. The wife had no notice of any fraud or fraudulent intention on his part. In an action by the trustee in bankruptcy of the husband to set aside the deed, it was held that it was not void under section 47, and, further, that to the extent of the wife's property received by the husband, the proviso for cesser of his life interest was good.

The word "void" in section 47 means "voidable," and a *bonâ fide* purchaser for value from a beneficiary under a settlement falling within the section, whether with or without notice of the settlement, has a good title against the trustee in bankruptcy.(*f*) Gifts of jewels by a husband to his wife within two years of his bankruptcy are void as against the trustee in bankruptcy of the husband, such gifts being a settlement within the section.(*g*) The section does not include a mere contract which is not a dealing with property.(*h*)

In the case of *In re Dale and Elsden*,(*i*) A., in

(*e*) [1895], 1 Ch. 505.

(*f*) *In re Vansittart; Ex parte Brown* [1893], 2 Q. B. 377; *In re Brall; Ex parte Norton* [1893], 2 Q. B. 381. For *contra*, see *Briggs* v. *Spicer* [1893], 2 Ch. 127.

(*g*) *In re Vansittart; Ex parte Brown, supra.*

(*h*) *Ex parte Home; Re Home*, 54 L. T. 301.

(*i*) [1892], W. N. 56.

consideration of B.'s paying his debts and taking on himself a liability, conveyed his property in trust for C., and B., in consideration of A. so conveying the property, agreed to pay A.'s debts, and to take on himself a liability. It was held in this case that there was a consideration moving from A. to B. and from B. to A., and that, therefore, the transaction was not a voluntary settlement within section 47 of the Bankruptcy Act, either by A. or B.

Where a minority of the creditors of a bankrupt were dissatisfied with the refusal of the trustee to take proceedings to recover property alleged to be part of the bankrupt's estate, and desire to take such proceedings themselves, they must, in the first place, apply to the trustee for leave to use his name, and offer him a proper indemnity; if he refuse they can apply to the court for leave to use his name on giving him an indemnity against costs.(*a*)

A bankrupt is not a proper party to a suit instituted by a trustee under his bankruptcy to set aside a conveyance executed by the bankrupt with intent to delay or defeat his creditors. The rule that a person implicated in a fraudulent transaction may be made a party to a suit impeaching the transaction for purposes of discovery, and costs is confined to cases in which the defendant fills the position of agent (including that of solicitor or attorney) or arbitrator.(*b*)

Where the trustee in a bankruptcy which is proceeding in a county court impeached a deed executed by the bankrupt as fraudulent under the statute of Elizabeth, if the amount at stake is beyond the ordinary jurisdic-

(*a*) *Ex parte Kearsley*; *In re Genese*, 17 Q. B. D. 1.
(*b*) *Weise* v. *Wardle*, 19 Eq. 171.

tion of the county court and serious questions of character are involved, and the persons interested under the deed desires that the question should not be tried in the county court, the county court judge ought to decline to exercise his jurisdiction, and ought to leave the matter to be tried in an action in the High Court.(*c*)

An unwilling purchaser from trustees of a voluntary settlement of freehold lands cannot object to the title on the grounds of section 47 of the Bankruptcy Act, 1883.(*d*)

A conspiracy by traders to dispose of their goods in contemplation of bankruptcy with intend to defraud creditors is an indictable offence at common law.(*e*) By section 13 of the Debtors Act, 1869, it is provided, that any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say,

(1.) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:

(2.) If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property:

(3.) If he has, with intent to defraud his creditors, concealed or removed any part of his property

(*c*) *Ex parte Price; In re Robarts*, 21 Ch. D. 553; *Ex parte Armitage; Re Learoyd, Wilton and Company*, 17 Ch. 13.

(*d*) *In re Carter and Kenderdine's Contract*, the "Times," 29th March, 1897; see also *Noyes* v. *Paterson* [1894], 3 Ch. 267, per contra cases; see *In re Briggs and Spicer* [1891], 2 Ch. 127; *In re Brall* [1893], 2 Q. B. 381; *In re Holden*, 20 Q. B. D. 43.

(*e*) *R.* v. *Hall*, 1 F. & F. 33.

since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

And by section 11, sub-sections 4 and 5, of the Debtors Act, 1869, a bankrupt is made liable to imprisonment if, after the presentation of a bankruptcy petition against him, or the commencement of a liquidation by arrangement in pursuance of the Bankruptcy Act, or within four months next before such presentation or commencement, he fraudulently conceals or removes any part of his property of the value of 10*l.* or upwards. See also sections 163, 164, and section 31 of the Bankruptcy Act, 1883, and section 12 of the Debtors Act, 1869.

For further information on the subject of this Chapter the reader is referred to the leading text books on Bankruptcy Law.

CHAPTER XVII.

Concerning Limitations of Property until Bankruptcy or Alienation.

It is a well-recognized principle that property cannot be limited to a man in such a way as to screen it from his creditors, or as to prevent him from alienating it, while his enjoyment of the property continues ;(*a*) and a proviso to this effect is void, and if it can be ascertained that the *cestui que trust* was intended by the deed to take a vested interest, the entire interest may be disposed of by the act of the *cestui que trust*, or may enure for the benefit of his creditors under the operation of the bankruptcy laws.(*b*) The question generally depends upon whether or not on the decease of the *cestui que trust* his executors would have a right to call upon the trustees of the settlement to account for arrears.(*c*) Nevertheless, it is not unlawful to give a person an estate, either in real or personal property, which is only to endure *until* he shall become bankrupt or insolvent, or shall make an attempt to alien or incumber his interest.(*d*) It is proposed in this chapter to show how

(*a*) *Brandon* v. *Robinson*, 18 Ves. 429 ; and Tudor's Leading Cases on Real Property, notes to *Bradley* v. *Peixoto ;* see *Ludlow* v. *Bunbury*, 35 Beav. 36 ; *Powell* v. *Boggis*, 35 L. J. Ch. 472 ; *Re Jones' Will*, 23 L. T. (N.S.) 211.

(*b*) Lewin in Trusts, 87 ; *Younghusband* v. *Gisborn*, 1 Cole, 400 ; *Green* v. *Spicer*, 1 R. & M. 395 ; *Greaves* v. *Dolphin*, 1 Sim. 66 ; *Piercy* v. *Roberts*, 1 M. & K. 4 ; *Snowdon* v. *Dales*, 6 Sim. 524.

(*c*) *Re Saunderson's Trusts*, 3 K. & J. 497.

(*d*) *Billson* v. *Crofts*, 15 Eq. 314 ; *Re Alwyn's Trusts*, 16 Eq. 585 ; and see *Re Porter ; Coulson* v. *Capper* [1892], 3 Ch. 481.

far the rights of creditors can be interfered with by limitations of the character just alluded to.

A man cannot, even on his marriage, limit an estate, his own property, to *himself* until he shall become bankrupt or insolvent, and then over, for this is a direct fraud upon the bankruptcy laws.(*a*) But it seems that a man may limit an estate to himself until he shall alien, mortgage, or in anywise charge or incumber it; and that such a clause of forfeiture will be valid against an *assignee or mortgagee.*

In the case of *Re Detmold*,(*b*) a marriage settlement of the settlor's own property was made on trust to pay the income to himself during his life, or until he should become bankrupt, or assign, charge, or encumber the said income, or should do or suffer something whereby the same, or some part thereof, would, through his act, default, or by process of law, if belonging absolutely to him, become vested in or payable to some other

(*a*) *Higinbotham* v. *Holme*, 19 Ves. 88; *Knight* v. *Brown*, 7 Jur. (N.S.) 894; *Brooke* v. *Pearson*, 27 Beav. 181; *Re Pearson*, 3 Ch. D. 807; *Re Casey's Trusts*, 4 Ir. Ch. Rep. 247; *Clarke* v. *Chambers*, 8 Ir. Ch. Rep. 26; *Murphy* v. *Abraham*, 15 Ir. Ch. Rep. 371; *Ex parte Alcock*, 1 V. & B. 179; *Synge* v. *Synge*, 4 Ir. Ch. Rep. 337; *Ex parte Hill*, 1 Cooke, B. L. 251 (8th edit.); *Ex parte Bennett*, 1 Cooke, B. L. 253; *Ex parte Murphy*, 1 Sch. & Lef. 44; *Gardiner* v. *Shannon*, 2 Sch. & Lef. 228; and see *Ex parte Brenchley*, 2 G. & J. 174; *Ex parte Taaffe*, 1 Gl. & Jam. 110; but see and consider *Re Detmold*, 40 Ch. D. 585. And see *Whitmore* v. *Mason*, 2 J. & H. 204, as to the application of the same principle to partnership deeds, in which the share of each partner is limited over on his bankruptcy to his copartners. There seems to be no objection, however, to a stipulation that on the bankruptcy of any partner the rest of the firm may purchase his share at a valuation. *Wilson* v. *Greenwood*, 1 Swanston. 471; *Peake* v. *Lightoller*, 1 Madd. 346.

(*b*) 40 Ch. D. 585.

person or persons, and from and after the determination of the trust in favour of the settlor upon trust to pay the income to his wife for life. It was held that the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment creditor of the husband, although the husband subsequently to the judgment became bankrupt.

In *Knight* v. *Browne*,(*c*) WOOD, V.C., said, that a man who settled his property on himself until he should make some attempt to hand it over to another person did not practice a fraud upon any one, so long as the clause determining the estate upon alienation was contained in the very same deed by which the estate itself was created.

In the case of *Phipps* v. *Lord Ennismore*,(*d*) the clause of forfeiture was contained in a separate deed, by the terms of which, upon the settlor's selling or mortgaging the estate, a secret trust was to arise for the benefit of himself and his family. It was held that the transaction was fraudulent, and that the deed containing the condition could not be supported against an incumbrancer.

In the case of *Brewer's Settlement; Morton* v. *Blackmore*,(*e*) a settlor assigned his property to trustees upon trust to pay the income to himself until his death or bankruptcy, or until he should "assign, charge, or incumber the said income, or do or suffer anything whereby the same or some part thereof would, through his act or default, become payable to or vested in some

(*c*) 7 Jur. (N.S.) 894; *Brooke* v. *Pearson*, 27 Beav. 181.
(*d*) 4 Russ. 131; see *Hennessy* v. *Bray*, 11 W. R. 1053.
(*e*) [1896], 2 Ch. 503.

other person or persons," with remainder in favour of the children of the marriage. In 1887 he got possession of the trust fund, and spent it for his own purposes. In 1891 he became bankrupt. The funds were afterwards replaced by the trustees, and the question now raised was whether the settlor's interest in the fund had been forfeited prior to the bankruptcy by his dissipating the trust fund. It was held by CHITTY, J., that his interest had not been determined prior to the bankruptcy, and, therefore, his life interest passed to the trustee in bankruptcy. But it was suggested that had the settlement contained the words "or cease to be payable to him," with a limitation over, such a dissipation of the trust fund would have worked a forfeiture before bankruptcy.

This case also decides that in construing clauses of cessor or forfeiture the court is not at liberty to depart from the language of the document, and ought not to supply words.

Although a man may not settle his own property upon himself until he becomes bankrupt or insolvent, nevertheless, it is not unlawful for him to make a settlement upon some other person with a clause determining the grantee's interest upon the latter's bankruptcy or insolvency.(*a*) Therefore, the life estate of the husband in a marriage settlement may be made determinable on these events, if the property was not brought into settlement by himself;(*b*) and of course there can be no

(*a*) *Billson* v. *Crofts*, 15 Eq. 314; *Re Alwyn's Trusts*, 16 Eq. 585.

(*b*) *In re Ashly; Ex parte Wreford* [1892], 1 Q. B. 522; *Brandon* v. *Robinson*, 18 Ves. 429; *Hammond* v. *Barrett*, 17 W. R. 1078; *Caulfield* v. *Maguire*, 5 Ir. Ch. Rep. 78; *Lewis* v. *Butler*, 16 W. R. 681; *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1;

objection in such a case to his interest being made determinable upon any attempt by him to alien or incumber the property. But in the case of *Mackintosh* v. *Pogose*,(*c*) where a wife possessed of separate property after the marriage allowed her husband to get possession of it. The husband having applied part thereof to his own use, settled the remainder of his wife's property, *together with some of his own*, upon trusts under which he took a life interest, with a proviso for cessor in the event of bankruptcy. The wife had no knowledge of any fraud or fraudulent intention, and the proviso was held to be good against the husband's trustee in bankruptcy.

A bond given by a husband for the payment of a certain sum on his bankruptcy is good to the extent of the fortune he has received with his wife.(*d*) So, also, a settlement by a husband of his own property in trust, upon the event of his bankruptcy, to raise a sum of money for his wife equal to the portion he has received with her is not fraudulent.(*e*)

In *Montefiore* v. *Behrens*,(*f*) a legacy to which the wife became entitled after the coverture was, by the con-

Lockyer v. *Savage*, 2 Str. 947; *Ex parte Hinton*, 14 Ves. 598; *Stephens* v. *James*, 4 Simon, 499; but see *Mackintosh* v. *Pogose* [1895], 1 Ch. 505. As to what is insolvency, see *De Tastet* v. *Tavernier*, 1 Keen, 161.

(*c*) [1895], 1 Ch. 505.

(*d*) *Ex parte Cooke*, 8 Ves. 353; *Ex parte Hodgson*, 19 Ves. 206; *Ex parte Young*, 3 Madd. 124; *Ex parte Meaghan*, 1 Sch. & Lef. 179; *Ex parte Oxley*, 1 Ball & B. 257; *Ex parte Robinson*, 1 Moll. 291; *Ex parte Hooper*, 1 M. & A. 395.

(*e*) *Higginson* v. *Kelly*, 1 Ball & B. 252; *Lester* v. *Garland*, 5 Sim. 205; *Ex parte Verner*, 1 Ball & B. 260.

(*f*) L. R. 1 Eq. 171.

sent of the husband and wife, settled upon the trusts of their marriage settlement. The trusts were (*inter alia*) for the husband, if he survived his wife, until he should alien or encumber the estate, and then over. It was held that, as equity would have ordered a settlement to be made, the wife had a right to have the legacy settled in such a way as to protect it from her husband's creditors, and that, therefore, the limitation to him was valid.

In *Ex parte Shute*,(*a*) a man on his marriage gave a bond to trustees for the payment of 1,200*l.* to be held upon trust for himself for life, if he should not become bankrupt, with remainder to his intended wife for life, with the usual limitations to the children. On the faith of this bond he was allowed to apply to his own use his wife's marriage portion amounting to 150*l.* Upon his bankruptcy it was held that the trustees were entitled to prove for the 1,200*l.*; that out of the dividend received they were to pay the wife interest for her life on the 150*l.*; and that the interest on the sum remaining in their hands was to be paid to the bankrupt's creditors during his life, and after his death upon the trusts of the bond.

The trust over on the husband's bankruptcy in property which is brought into settlement by the wife or some third person is sometimes limited in favour of the bankrupt himself jointly with the wife and children.(*b*) In such cases the trustee in bankruptcy will take the share the bankrupt himself would have been entitled to. If the distribution between the husband, wife and

(*a*) 3 D. & Ch. 1.

(*b*) *Wallace* v. *Anderson*, 16 Beav. 533; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98.

children is in the uncontrolled discretion of the trustees of the settlement, the trustee in bankruptcy will take whatever they allot to the husband ; though equity will not in such a case control the trustees of the settlement in making a division of the property.(*c*) But where there is an absolute and imperative trust for the maintenance and support of the husband, wife and children, it will be referred to the Master to find what is necessary for the wife and children, and the creditors of the husband will take the residue.(*d*)

An estate may be given to a man until he becomes bankrupt or attempts to alienate, without any limitation over.(*e*)

Where a testator gave property to trustees in trust for his son for his life, until he should become bankrupt, or insolvent, or compound with his creditors, and, *after any of such events*, then upon trust for the benefit of other persons, it was held that the limitation over was not contingent on the happening of the bankruptcy, insolvency, &c., but took effect on the death of the grantee.(*f*)

Where an estate is given to a man until he becomes bankrupt and then over, the clause of forfeiture will take effect if the grantee is a bankrupt at the date

(*c*) *Holmes* v. *Penney*, 3 K. & J. 90 ; *Godden* v. *Crowhurst*, 10 Simon, 642 ; *Younghusband* v. *Gisborne*, 1 Coll. 400 ; *In re Coe's Trust*, 4 K. & J. 199 ; *Re Bullock ; Good* v. *Lickorish*, 64 L. T. 736.

(*d*) *Page* v. *Way*, 3 Beav. 20 ; and see *Rippon* v. *Norton*, 2 Beav. 63 ; *Kearsley* v. *Woodcock*, 3 Hare, 185 ; *Wallace* v. *Anderson*, 16 Beav. 533 ; *Re Sanderson's Trust*, 3 K. & J. 497 ; *Davidson* v. *Foley*, 2 Bro. Ch. Ca. 202.

(*e*) *Dommett* v. *Bedford*, 6 T. R. 684 ; *Joel* v. *Mills*, 3 K. &. J. 458 ; *Rochford* v. *Hackman*, 9 Hare, 475.

(*f*) *Etches* v. *Etches*, 3 Drew. 441 ; *Re Muggeridge's Trusts*, Johnson, 625 ; *Wardroper* v. *Cutfield*, 10 L. T. (N.S.) 19.

of the settlement,(*a*) or is adjudicated one before his interest comes into actual possession ;(*b*) unless, indeed, he procures the bankruptcy to be annulled in time to intercept the rents and profits of the estate before they have been handed over to any other person.(*c*) In *Dorsett* v. *Dorsett*,(*d*) a testator bequeathed his residuary estate to trustees in trust for his nephews for life, or until any of them became bankrupt. Upon the death or bankruptcy of any nephew his share was to be paid to the children of such nephew ; and if he died without children then his share was to go to the surviving nephews and their children at the same time and in the same manner as the original shares, or as near thereto as circumstances would permit. It was held, upon the bankruptcy of a nephew, that the interest of the children was accelerated, and that both the original and also an accrued share passed to the children of such nephew, though he had ceased to be bankrupt and had obtained his certificate before the accrued share fell in.

If the clause against assigning or encumbering the estate plainly contemplates a *voluntary* act on the part of the grantee, his interest will not be forfeited by the involuntary transfer which takes place on bankruptcy(*e*)

(*a*) *Manning* v. *Chambers*, 1 De G. & S. 282 ; *Yarnold* v. *Moorhouse*, 1 Russ. & My. 364 ; *Seymour* v. *Lucas*, 1 Dr. & Sm. 177 ; *Trappes* v. *Meredith*, L. R. 7 Ch. 248.

(*b*) *Sharp* v. *Cosserat*, 20 Beav. 470 ; *Re Muggeridge's Trusts*, Johnson, 625 ; see *Ex parte Payne*, 25 Beav. 556.

(*c*) *White* v. *Chitty*, L. R. 1 Eq. 372 ; *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722 ; see *Cox* v. *Fonblanque*, L. R. 6 Eq. 482 ; and see *Re Parnham's Trust*, L. R. 13 Eq. 413 ; *Ancona* v. *Waddell*, 10 Ch. D. 157 ; *Robertson* v. *Richardson*, 30 Ch. D. 623.

(*d*) 30 Beav. 256.

(*e*) *Whitfield* v. *Prickett*, 2 Keen, 608 ; *Graham* v. *Lee*, 23 Beav.

or outlawry.(*f*) But it will be otherwise if he himself commences the proceedings in bankruptcy ;(*g*) or of his own free will divest himself of his property for the benefit of his creditors.(*h*) An estate with such a condition attached to it will be forfeited if the grantee executes a warrant of attorney with the view of evading the prohibition against alienation ;(*i*) or if he charges the estate with debts, or gives power to a creditor to receive the rents both present and future.(*k*)

If, however, the clause of forfeiture is so framed as to extend to an *involuntary* alienation or incumbrance, the grantee's interest will determine if he becomes bankrupt ; or if a creditor takes the property in execution, or obtains a charging order against it.(*l*)

388 ; *Lear* v. *Leggett*, 1 Russ. & My. 690 ; *Pym* v. *Lockyer*, 12 Simon, 394 ; and see *Cooper* v. *Wyatt*, 5 Madd. 482 ; and *Fowkes* v. *Pascoe*, L. R. 10 Ch. 345.

(*f*) *Rex* v. *Robinson*, Wightw. 386.

(*g*) *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722 ; *Shee* v. *Hale*, 13 Ves. 404 ; *Martin* v. *Margham*, 14 Simon, 230 ; *Brandon* v. *Aston*, 2 Y. & C. C. C. 24 ; *Rochford* v. *Hackman*, 9 Hare, 475 ; *Churchill* v. *Marks*, 1 Coll. 441 ; *Hill* v. *Cowdery*, 1 H. & N. 360 ; see also Cases in note (*c*), *supra*, and *Redway* v. *Sweeting*, L. R. 2 Ex. 401.

(*h*) *Lewes* v. *Lewes*, 6 Simon, 304 ; but see *Re Waley's Trust*, 3 Eq. Rep. 380.

(*i*) *Avison* v. *Holmes*, 1 J. & H. 530 ; *Doe* v. *Hawke*, 2 East, 481 ; *Doe* v. *Carter*, 8 T. R. 57, 300 ; *Seymour* v. *Lucas*, 1 Dr. & Sm. 177 ; *Croft* v. *Lumley*, 6 H. L. C. 672.

(*k*) *Wilkinson* v. *Wilkinson*, 3 Swanston, 515 ; followed in *Oldham* v. *Oldham*, L. R. 3 Eq. 404. That an attempt to alien, though ineffectual, may cause the estate to be forfeited, see *Barnett* v. *Blake*, 2 Dr. & Sm. 117 ; *Jones* v. *Wyse*, 2 Keen, 285 ; *Graham* v. *Lee*, 23 Beav. 388 ; *Warbrick* v. *Varley*, 30 Beav. 347.

(*l*) *Roffey* v. *Bent*, L. R. 3 Eq. 759 ; *Ex parte Fyston*, 7 Ch. D. 145 ; *Stockwell* v. *Yeates*, 17 W. R. 22 ; *Montefiore* v. *Behrens*, L. R. 1 Eq. 171.

An estate given until insolvency has been forfeited by the grantee executing a deed of inspectorship under the old bankruptcy law, accompanied by a declaration that he is unable to meet his engagements ;(*a*) but if the words of the clause of forfeiture clearly show that the estate was not to go over unless the grantee actually parted with the property, the execution by him of such a deed of inspectorship did not have the effect of determining his interest.(*b*)

In *Re Stultz's Trust*,(*c*) there was a proviso that a person who had a life interest in certain funds should not anticipate, or otherwise in any manner assign or encumber the dividends which would be payable to him, and it was held that the prohibition applied only to future dividends and not to arrears.

The question whether marriage will cause a forfeiture of an estate limited to a woman until she does some act whereby the property may become vested in another person must depend upon the terms of the clause of forfeiture, and the nature of the property, though since the passing of the Married Women's Property Act, 1882, it is difficult to see how such a question can now arise as a married woman does not now part with her property on her marriage by the act of marriage. In *Bonfield* v. *Hassell*,(*d*) a person covenanted to pay an annuity to a woman until she should do any act whereby the same or any part thereof should be vested or become liable to be vested in any other person. She married, but

(*a*) *Freeman* v. *Bowen*, 35 Beav. 17 ; *Re Muggeridge's Trusts*, Johnson, 625.

(*b*) *Montefiore* v. *Enthoven*, L. R. 5 Eq. 35.

(*c*) 4 De G. M. & G. 404 ; see *Cox* v. *Bockett*, 35 Beav. 48.

(*d*) 32 Beav. 217.

her husband did not interfere with the annuity. It was held that the marriage was not a forfeiture of the wife's interest, because the annuity being a chose in action would not vest in the husband until it was reduced into possession; and besides it appeared that, upon the application of the wife, equity would have ordered a settlement to be made upon her of the greater portion, or perhaps (if the husband assented) of the whole of the property. In *Craven* v. *Brady*,(*e*) a husband devised real estate to his wife and *her assigns* during her life, and there was a proviso determining her interest if she "should do, make, or execute any deed, matter, or thing whereby she should be deprived of the rents and profits, or the power or right to receive, or the control over the same, so that her receipt alone should be a sufficient discharge for the same." By a codicil the testator gave his personal estate to his wife for life for her separate use, independently of any future husband. The wife married again without making any settlement. It was held that, notwithstanding the limitation to her and her assigns, and the allusion to a future husband in the codicil, the wife's life estate was forfeited by her second marriage.

A deed, by which a debtor purports to assign generally all his property and estate, both at law and in equity, to trustees upon certain trusts for the benefit of his creditors, will not affect an estate which is liable to be forfeited upon an attempted alienation; because it cannot be supposed that the parties intended to include property which would be lost in the very act of assigning it, and from which consequently creditors would

(*e*) L. R. 4 Ch. 296; L. R. 4 Eq. 209; S. C.; see *May* v. *May*, 19 W. R. 432.

never receive any benefit.(*a*) However, in *Carter* v. *Carter*,(*b*) several persons, believing themselves to be tenants in common in fee under a will, conveyed their supposed shares, and *all their interests in the testator's estates* to a mortgagee. It turned out some years afterwards that the testator had executed another will, revoking the former one, and giving these same persons annuities merely, determinable on bankruptcy or alienation. It was held that the general words used in the operative part of the mortgage were large enough to include the interest of the mortgagors under the second will, and that, therefore, the annuities were forfeited.

In *Haswell* v. *Haswell*,(*c*) a fund was settled in trust for a husband for life or until insolvency, with remainder to his wife for life, with remainder to the children of the marriage as the survivor of the husband and wife should by deed or will appoint; and in default of appointment, after the death of the husband and wife or the sooner determination of the interests limited to them respectively, for the children of the marriage. The husband became insolvent, and afterwards the wife died. It was held that the true meaning of the settlement was that the power was only to be exercised during the continuance of the interests both of the husband and wife; and that, therefore, the husband could not as "survivor" disturb the estates of the children, which had already vested for want of an appointment.

(*a*) *Re Waley's Trusts*, 3 Eq. Rep. 380; see *Townsend* v. *Early*, 34 Beav. 23.

(*b*) 3 K. & J. 617; see, however, *Mumford* v. *Stohwasser*, 22 W. R. 833, where *Carter* v. *Carter* is looked upon as bad law.

(*c*) 28 Beav. 26; see also *In re Aylwin's Trusts*, L. R. 18 Eq. 585; *Re Edgington's Trusts*, 3 Drew. 202.

Trusts framed with the object of preventing the barring of entails, or imposing restrictions on the alienation of property, are contrary to the policy of the law, and are, therefore, void,(*d*) with the single exception of trusts limiting the power of a married woman to alienate her separate property *during coverture*, which are allowed by the law.

d) *Floyer* v. *Bankes*, 8 Eq. 115 ; *Sykes* v. *Sykes*, 13 Eq. 56 ; and as to alienation, see *Snowdon* v. *Dales*, 6 Sim. 524 ; *Green* v. *Spicer*, 1 B. & M. 395 ; *Brandon* v. *Robinson*, 18 Ves. 429 ; *Ware* v. *Cann*, 10 B. & C. 433 ; *Hood* v. *Oglander*, 34 Beav. 513.

CHAPTER XVIII.

The Statutes 27 Eliz. c. 4, and 56 & 57 Vict. c. 21.

In considering the statute 27 Eliz. c. 4, the reader must not lose sight of the Voluntary Conveyances Act, 1893.(*a*) By the statute 27 Eliz. c. 4 (which is entitled An Act against Covinous and Fraudulent Conveyances, and which is in *pari materiâ* with the statute 13 Eliz. c. 5), it is recited (section 1), that: Forasmuch as not only the Queen's most Excellent Majesty, but also divers of her highness's good and loving subjects, and bodies politic and corporate, after conveyances obtained or to be obtained, and purchases made or to be made, of lands, tenements, leases, estates, and hereditaments, for money or other good considerations, may have, incur, and receive great loss and prejudice, by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitation of uses heretofore made, or hereafter to be made of, in, or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses, and conveyances were, or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else by the secret intent of the parties the same to be to their own proper use, and at their free disposition, coloured nevertheless by a feigned countenance and show of words and sentences, as though

(*a*) 56 & 57 Vict. c. 21; see *post*.

the same were made *bonâ fide* for good causes, and upon just and lawful considerations.

Section 2. For remedy of which inconveniences, and for the avoiding of such fraudulent, feigned, and covinous conveyances, gifts, grants, charges, uses, and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements, and hereditaments: Be it enacted, that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made at any time heretofore sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having or claiming by, from, or under them, or any of them, which have purchased or shall hereafter so purchase for money, or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity in or out of the same, to be utterly void, frustate, and of none effect; any pretence,

colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

By section 3 it is further enacted, that all and every the parties to such feigned, covinous, and fraudulent gifts, grants, leases, charges, or conveyances before expressed, or being privy and knowing of the same, or any of them, which after the 20th day of April next coming, shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had or made, *bonâ fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators, or assigns, or such as have or shall lawfully claim anything by, from, or under them, or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments so purchased or charged; the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent gift, grant, lease, conveyance, incumbrance, or limitation of use, to be recovered in any of the Queen's courts of record, by action of debt, bill, plaint, or information, wherein no essoign, protection or wager of law shall be admitted for the defendant or defendants; and also being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprize.(*a*)

By section 4 it is provided, that this Act or anything therein contained shall not extend or be construed to impeach, defeat, make void, or frustate any conveyance, assignment of lease, assurance, grant, charge, lease,

(*a*) See *infra*, Chapter XXIV.

estate, interest, or limitation of use or uses, of, in, to, or out of any lands, tenements, or hereditaments heretofore at any time had or made, or hereafter to be had or made, upon, or for good consideration and *bonâ fide*, to any person or persons, bodies politic or corporate; anything before mentioned to the contrary hereof notwithstanding.(*b*)

By the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), it is enacted by section 2, that subject as thereinafter mentioned, no voluntary conveyance of any lands, tenements, or hereditaments, *whether made before or after* the passing of this Act, if, in fact, made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding.

And by section 3, this Act does not apply to any case in which the author of a voluntary conveyance of any lands, tenements, or hereditaments has subsequently, but before the passing of this Act, disposed of or dealt with the same lands, tenements, or hereditaments to or in favour of a purchaser for value.

By section 4, the expression "conveyance" includes every mode of disposition mentioned or referred to in the said Act of Elizabeth.

To put the effect of this statute shortly, it appears that a voluntary settlement or conveyance is not to be deemed fraudulent and avoided under 27 Eliz. c. 4, by reason of a subsequent purchase for value.

(*b*) Section 5 to the end of the Act was repealed by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125).

CHAPTER XIX.

As to the Scope and Object of the Statute 27 Eliz. c. 4.

THE statute 27 Eliz. c. 4, was passed in order to provide for purchasers a protection against fraudulent assurances similar to that provided by the 13 Eliz. c. 5, in favour of creditors. It is necessary to keep the different objects of the statutes clearly in view, as some confusion has arisen from the distinction between them not being carefully observed. For iustance, it has been supposed by some that because the fact of the settlor being indebted at the time of the voluntary settlement is a badge of fraud within the statute 13 Eliz. c. 5, it is also a badge of fraud within the statute 27 Eliz. c. 4.(*a*) This idea is now exploded, and it is clearly settled that the fact of the settlor being indebted at the time he made the voluntary settlement is no evidence of an intent to defraud subsequent purchasers.

Of course, where a settlement is executed with the *express* intent to defraud subsequent purchasers it will be void by virtue of the statute now under consideration.(*b*) In the case of *Cracknall* v. *Janson*(*c*), a man executed a mortgage in favour of his step-daughter; he kept the deeds of the property including the mortgage himself, to be used if convenient; it was his secret intention that the same should be at his free disposition,

(*a*) *Doe* v. *Routledge*, Cowper, 705.

(*b*) *Standen* v. *Bullock*, 3 Rep. 82 b; *Gooch's Case*, 5 Rep. 60; *Burrell's Case*, 6 Rep. 72.

(*c*) 11 Ch. D. 1.

so that he could deal with the property as he liked by sale or mortgage. The mortgage was held to be void under the statute. But a construction came to be put upon the act by which previous to the passing of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), the necessity of proving actual fraud was dispensed with; and it is held that the mere fact of the settlement being without consideration sufficiently evidences an intention to defraud purchasers, although they bought with full notice of the voluntary settlement. Lord ELDON, in the case of *Buckle* v. *Mitchell*,(*d*) said he had great difficulty in persuading himself that the words of the statute warranted, or that the purpose of it required such a construction, as it was not easy to conceive how a purchaser could be defrauded by a settlement of which he had notice before he made his purchase, but that it was essential to the security of property that the rule should be adhered to, when settled, whatever doubt there might be as to the grounds on which it originally stood.(*e*) And as the same rule prevailed in equity as at law, a purchaser for value of an equitable interest in real property was not affected by notice of a prior voluntary settlement, any more than a purchaser of the legal estate was.(*f*)

(*d*) 1 Ves. 100, 110; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; *Metcalfe* v. *Pulvertoft*, 1 V. & B. 180; *Doe* v. *Manning*, 9 East, 59; *Chapman* v. *Emery*, Cowper, 278; *Cormick* v. *Trapaud*, Dowl. 60; *Doe* v. *Martyr*, 1 N. R. 332; *White* v. *Sansom*, 3 Atk. 412; *Powell* v. *Pleydell*, 1 Bro. P. C. 124; *Tomkins* v. *Ennis*, 1 Eq. Ca. Abr. 334; *Alden* v. *Gregory*, 2 Eden. 280; see, however, 56 & 57 Vict. c. 21.

(*e*) See the remarks of Lord HATHERLEY in *Bayspoole* v. *Collins*, L. R. 6 Ch. 228, 232; *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*f*) *Buckle* v. *Mitchell*, 18 Ves. 100, see p. 110.

In the case of *Godfrey* v. *Poole*, (*a*) a debtor conveyed all his real estate upon trust to sell and pay off his debts, and as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, and after her decease in trust for their children in equal shares as tenants in common. It was held in a suit by a subsequent purchaser for value (at a sale in execution) of the grantor's interest in some lands comprised in the conveyance :—

(1.) That the deed of conveyance was not revocable, there being an ultimate trust for the benefit of the wife and children :

(2.) That it was not void as intended to defeat or delay creditors.

(3.) That not being fraudulent in fact, it was not fraudulent in law and void against creditors under 13 Eliz. c. 5, no intention to delay or defeat creditors being shown ; and

(4.) That it was not void under 27 Eliz. c. 4, as against a purchaser for value. The subsequent sale for value not being by the voluntary grantor, no presumption arose that the prior grant was fraudulent.

And now since the Voluntary Conveyances Act, 1893,(*b*) has enacted that a voluntary settlement or conveyance is not to be deemed fraudulent and avoided under 27 Eliz. c. 4, by reason of a subsequent purchase for value, the above cases and some of those subsequently quoted appear to be obsolete ; except that the new Act does not extend, to cases where the subsequent purchase has been made before the 29th day of June,

(*a*) 13 App. Cas. 497.

(*b*) 56 & 57 Vict. c. 21, and see preceding chapter.

1893, and many titles depend upon the validity of such subsequent purchases made before that date.

Articles of agreement for the sale of an estate will be enforced at the suit of the purchaser in spite of a prior voluntary settlement, because after a contract for sale is once entered into the purchaser is looked upon in equity as the complete owner of the estate.(*c*)

As the statute was passed only for the benefit of subsequent purchasers for valuable consideration, and as it leaves the settlement in other respects in all its integrity, it is a rule that the settlement shall be avoided only so far as is necessary to give full effect to the subsequent sale. This may be illustrated by the case of a mortgage, which it will be seen hereafter(*d*) is only a revocation *pro tanto* of a prior voluntary instrument, and also by the case of a sale of a partial interest, such as a life estate. After the mortgage is paid off, or the life interest terminated, the settled estate remains in the hands of the voluntary grantee as before.

In *Croker* v. *Martin*,(*e*) a father by a voluntary deed of settlement conveyed leasehold lands in Ireland to trustees upon trust for himself for life, and then upon trust for his son, his executors, administrators, and assigns. Subsequently, on the marriage of his son, he made a different settlement of the same lands, and conveyed them to trustees in trust for his son for life, with certain limitations over in favour of the son's issue male.

(*c*) And see *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84 ; *Hart* v. *Middlehurst*, 3 Atk. 371, 377 ; *Parslowe* v. *Weedon*, 1 Eq. Abr. 149; *Powell* v. *Pleydell*, 1 Bro. P. C. 124 ; see *Carew* v. *Arundell*, 8 Jur. (N.S.) 71 ; *Buckle* v. *Mitchell*, 18 Ves. 100.

(*d*) Chapter XXII.

(*e*) 1 Dow. (N.S.) 15.

and with a power to raise portions for the daughters of the marriage. In the same settlement there was contained a provision that, after all the aforesaid limitations were satisfied, the estate should revert to the father. The portions were raised, and the son died without issue male, so that there was an end of the limitations contained in the marriage settlement. The father then died, having disposed by will of all his property in favour of his daughters. The question for the court was, whether the reversionary interest reserved by the father in the marriage settlement passed under his will, or was bound by the trusts of the voluntary settlement. It was held, that the voluntary settlement was binding on the father, and void against those parties only who claimed as purchasers under the marriage settlement ; and that, as the father was not a purchaser of the estate reserved to himself in the marriage settlement, the trusts of the voluntary settlement remained unaffected by his will.

The statute enables a settlor to defeat a settlement which he has created on behalf of his family, but it only does so upon a subsequent conveyance to a purchaser for actual value. A mortgagee is a purchaser within the meaning of the statute. Where a voluntary settlement has been made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it, which the settlor himself would not have possessed. A court of equity will not interfere actively against a volunteer through the medium of a person (not a purchaser for value) claiming only through him who has created the voluntary settlement.(*a*)

A voluntary settlement may be defeated by a sale to a subsequent purchaser for valuable consideration,

(*a*) See *Dolphin* v. *Aylward*, 4 H. L. 486.

although the property comprised in the settlement is not expressly referred to in the conveyance to the purchaser. If it can be collected from the surrounding circumstances that it was intended to be included in the sale, the property may pass under the general words contained in a purchase or mortgage deed. But, of course, this is only where the intention of selling the property is clearly made out by reference to the amount of the consideration money or other matters. If the intention is not clear, it would seem to be a violation of the rule last noticed to favour the purchaser more than the voluntary grantee, whose estate is unimpeachable, except so far as it is clearly defeated by a subsequent sale for value. In *Barton* v. *Vanheythuysen*,(*b*) a person made a voluntary settlement of real and personal estate on his wife and children. Part of the real estate consisted of Holbrook Lodge by name. Shortly afterwards the settlor fraudulently sold a large sum of stock belonging to the plaintiffs, and appropriated the money produced by the sale. Immediately upon the discovery of the fraud the plaintiffs took steps to recover from the settlor the money so misapplied. Part of stock was retransferred, and a mortgage executed to secure the residue. By this mortgage the settlor was expressed to grant, convey and assign to a trustee, his heirs, executors, administrators, and assigns, all and singular his real and personal estate, rights and credits upon trust to sell the same, and out of the proceeds of the sales to satisfy the debt owing to the plaintiffs. It was held that although Holbrook Lodge was not mentioned in the mortgage, it nevertheless passed to the plaintiffs and their trustee. The Vice-Chancellor said, that the mortgagees certainly

(*b*) 11 Hare, 126 ; and see *Parker* v. *Sarjeant*, Finch, 146.

intended to acquire all that the mortgagor could give them, and taking the Holbrook estate to be the mortgagor's, as between him and the purchasers, the words of description, "all my estate," would be sufficient to embrace it.

Lord ST. LEONARDS was of opinion,(*a*) that the law, as laid down in *Barton* v. *Vanheythuysen*, requires further consideration. Certainly in that case it might fairly be presumed to have been the intention of the parties that the settled estate should pass to the mortgagees, for the sum secured was very large, and the mortgagor appears not to have had any landed property, except that which was comprised in the settlement. In a doubtful case, however, the sound rule appears to be not to disturb the voluntary settlement without very plain evidence that the property comprised in it is intended to be included in the subsequent sale or mortgage.

It appears plain that the statute 27 Eliz. c. 4, applies where a post-nuptial or voluntary settlement of real estate has been made with the sanction of the Court of Chancery. There is no authority on the subject cited by text writers except the case of *Martin* v. *Martin*,(*b*) which seems, however, not to have been decided upon the statute under consideration, but upon a different principle. There, after the marriage of a female ward, a settlement was made under the direction of the Court of Chancery, for the benefit of the wife and children of the marriage, of an estate in Demerara, of which the wife was seised in fee at the time of the marriage. The husband

(*a*) Sugden V. & P. 713 (14th edit.); see *Cadell* v. *Bewley*, 15 W. R. 703.

(*b*) 2 Russ. & My. 507.

and wife afterwards mortgaged the estate to persons having full notice of the settlement. By the laws of Demerara the settlement was a nullity, and did not affect the rights and powers of the husband and wife over the estate. It was held that the mortgage was valid, and that the equity of the wife and children attached only on the person of the husband, and not on the estate. The Master of the Rolls said, that "he was inclined to think that if the estate had been unincumbered, and a bill had been filed by the wife for the sale of it and for the investment of the money produced by the sale upon the trusts of the settlement, the court might have relieved her, upon the ground that it would effectuate the actual purpose of the court in directing the settlement. But, seeing that the settlement, as executed, did by the laws of Demerara in no manner affect the right and power of the husband and wife over the estate, but left them with the same absolute ownership they would have had if there had been no settlement, it appeared to him that the equity of the wife did not attach upon the estate, but upon the person of the husband." No mention was made of the statute 27 Eliz. c. 4; and, therefore, although there appears to be no doubt that a voluntary settlement made with the sanction of the Court of Chancery may be defeated by a subsequent sale to a purchaser for value, it may be questionable how far this proposition is supported by the case of *Martin* v. *Martin*,(c) which is the only authority on the subject to be found in the reports.

The statute 27 Eliz. c. 4, extends to voluntary con-

(c) See the case cited in "Lewin on Trusts," 48, note (8th edit.); and in 2 Spence, Eq. Jur. 13.

veyances made to the Crown,(*a*) which is bound by an Act made to suppress fraud, although not specially named. The general rule is that, although the King may take advantage of an Act of Parliament, he is not bound by it, unless expressly mentioned. Several exceptions, however, are allowed to this rule, viz., in the case of Acts passed for the public good, the relief of the poor, the general advancement of learning, religion, and justice, or to prevent fraud, injustice, and wrong, &c.(*b*) Amongst the last mentioned the statute 27 Eliz. c. 4, is clearly included.

The statute under consideration does not apply to voluntary grants made in favour of charities.(*c*)

A post-nuptial settlement of the estates of a married woman is not within the statute if it can be shown that the settlement was not voluntary; and it would appear that the smallest consideration is sufficient to take it out of the statute. It is settled that if a husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife, which is not a transaction without consideration. There appears to have been some conflict of authority on this point; but any doubts there may have been at one time have now been set at rest by the cases *In re Foster and Lister*(*d*)

(*a*) *Magdalen College Case*, 11 Coke Rep. 66; and see *Wiseman's Case*, 2 Rep. 15; *Cholmley's Case*, 2 Rep. 50.

(*b*) "Chitty on Prerog. of the Crown," Chap. XV., p. 382.

(*c*) *Ramsay* v. *Gilchrist*, 92 A. C. 412; see also *per* Lord LYNDHURST in *The Corporation of Newcastle* v. *Attorney-Geueral*, 12 C. & F. 402, 415; *Attorney-General* v. *Dulwich College*, 4 Beav 255; *Trye* v. *Corporation of Gloucester*, 14 Beav. 173.

(*d*) 6 Ch. D. 87.

and *Teasedale* v. *Braithwaite*.(*e*) In the first of these cases the facts were, that by a post-nuptial settlement certain freeholds belonging to the wife were settled by the husband and wife to the use of the wife for life, and after her decease to such uses as she should by will appoint, and in default of appointment to the use of her children, with a power during her life for the wife to lease at rack rent, and with a power of sale and exchange in the trustees with her consent. It was held that the settlement was for valuable consideration, and, therefore, not void under the statute 27 Eliz. c. 4, and that the same must be upheld against a subsequent mortgagee. In this case JESSEL, M.R., reviewed all the previous authorities, many of which he disagreed with. He also says: "The question is, Whether this is a settlement made for value, or is it voluntary? which depends simply upon two things: first, upon the construction of the settlement itself; and secondly, upon the law as to what a voluntary settlement is. First of all, on the construction of the settlement itself, independently of the question whether the mere concurrence of the husband, his concurrence being necessary for the conveyance of the wife's estate, is value on his part, there arises also the question whether he did not give up something. It is not a voluntary settlement if there is anything in the shape of consideration which can be called value." His lordship was of opinion that in this case the husband gave up his estate by curtesy; also the power of preventing the wife from alienating the estate during his life, so that if she died in his lifetime it would descend to the heir-at-law. The wife, on the other hand, was reduced from being an owner in fee to

(*e*) 4 Ch. D. 85; affirmed on appeal, 5 Ch. D. 630.

a life estate, with a testamentary power of appointment, the estate going in default to her children. But she gained several things—a power of alienation in this sense, that she had the right to lease the property at a rack rent, which was reserved to her alone, and she had a right to concur in a sale without her husband concurring at all. This materially altered the positions of the husband and wife, and his lordship held that what the husband gave to the wife was value as between him and the wife, and what the wife gave up was also value on her part.(*a*)

The principle of the statute 27 Eliz. c. 4, may be extended to the case where a first mortgagee has purposely left the title deeds of the mortgaged estate in the hands of the mortgagor.(*b*) The natural consequence of such behaviour is to lead subsequent mortgagees and others to advance money on the faith of the mortgagor's representations as to his being the sole owner of the estate. Anyone, therefore, who is a party to a dishonest transaction of this kind ought justly to be postponed to those who have been defrauded by his connivance. In the case of *Cracknall* v. *Janson*,(*c*) a mortgage executed in 1871 contained a recital that the mortgagor was indebted to the mortgagee in the sum of 1,500*l.* for moneys advanced by her to him, and that he had agreed to secure the payment of the same by the mortgage. The money had been advanced in 1864, and the evidence showed that there was at that time no agreement for a

(*a*) See also *Schrieber* v. *Dinkel*, 54 L. J. Ch. 241 ; (1886), W. N. p. 78 ; *Shurmer* v. *Sedgwick*, 24 Ch. D. 604 ; *Price* v. *Jenkins*, 5 Ch. D. 619.

(*b*) See, on this subject, 1 "Story on Equity," sects. 390—94.

(*c*) 11 Ch. D. 1.

mortgage, and that there was no subsequent pressure by the lender. The mortgage deed was retained by the mortgagor, and there was nothing to show that the mortgagee knew of its execution till February, 1874. It was held by FRY, J., and the Court of Appeal, that the mortgage was void under 27 Eliz. c. 4, as against a mortgagee for value whose mortgage was executed in February, 1872; also that the recital of the agreement did not operate as an estoppel against the mortgagor. In the case of *Perry Herrick* v. *Attwood*,(*d*) John Attwood, the mortgagor, voluntarily gave his sisters a mortgage to secure an antecedent debt. The sisters allowed him to retain the title deeds, in order that he might be enabled to give a first mortgage to certain creditors, who were pressing him for payment of their debts, which amounted to upwards of 15,000*l*. Attwood deposited the title deeds with the creditors to secure the sums he owed them. Afterwards, without the creditors' consent, he got back the deeds, and mortgaged the estate to the plaintiffs for the sum of 26,000*l*. It was held that the mortgage to the plaintiffs was entitled to priority over the mortgage to the Misses Attwood; and further, that, as these ladies had, with the view of enabling their brother to raise a particular sum in priority to their own mortgage, put it in his power to represent himself as unincumbered owner of the estate, they could not, as against the plaintiffs, who had advanced money on the faith of the mortgagor's possession of the deeds, complain that he had raised a larger sum than was agreed on. The Lord Chancellor said that, although it was not

(*d*) 25 Beav. 205, cited in *Briggs* v. *Jones*, L. R. 10 Eq. 92, 98; see also *Clarke* v. *Palmer*, 21 Ch. D. 124; *Lloyd's Banking Company* v. *Jones*, 29 Ch. D. 221; *Manners* v. *Mew*, 29 Ch. D. 725.

necessary for the purpose of deciding the case to consider whether it was within the statute 27 Eliz. c. 4, he thought that certainly it was within its principle; for the Act spoke not of voluntary, but of fraudulent and secret conveyances, which the parties intended to be to their own use. And he said that, if the statute did apply to the case, the only difference would be that the plaintiffs would have been enabled to bring an action of ejectment at law to recover the property; but that even if they had done so, this would not have interfered with the relief which they sought in equity.(*a*)

It is said, that the principle of the statute 27 Eliz. c. 4, applies to the case where the owner of a particular estate has made a voluntary assurance, and afterwards surrendered up his interest (including the settled estate) into the hands of the reversioner for valuable consideration; that, in such case, the voluntary conveyance will be void against the surrenderee, although, strictly speaking, he purchases no estate, but only the extinguishment of one.(*b*)

In the statute 27 Eliz. c. 4, as in the statute 13 Eliz. c. 5, there is contained a proviso that nothing in the act shall extend to impeach or make void any assurances of lands made upon good, that is, valuable consideration and *bonâ fide* (section 4). It has been shown before, when speaking of the earlier statute,(*c*) that a post-

(*a*) See *Aldborough* v. *Trye*, 7 Cl. & Fin. 436, 463; *Judd* v. *Green*, 33 L. T. 597; *Parr* v. *Eliason*, 1 East, 95; *Tottenham* v. *Green*, 32 L. J. Ch. 201; *Bateman* v. *Green*, 2 Ir. Rep. C. L. 166; *Clarke* v. *Hoskins*, 37 L. J. Ch. 561; *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

(*b*) "Roberts on Voluntary Conveyances," 376.

(*c*) *Supra*, Chapter V.; and *Bayspoole* v. *Collins*, L. R. 6 Ch. 228.

nuptial settlement by a man on his wife and family may be supported against creditors and subsequent purchasers, where the transaction is part of an honest bargain between the settlor and some other person, who has advanced the settlor money or incurred some loss for his benefit, in consideration of the settlement being made. And it has also been shown, that a *bonâ fide* sale for valuable consideration by a voluntary grantee cannot be defeated by subsequent purchasers from the original grantor.(*d*)

(*d*) *Supra*, Chapter VI.

CHAPTER XX.

A Voluntary Grant of Lands is irrevocable except as to Purchasers for Value from the same Grantor.

It is worthy of remark that the statute 27 Eliz. c. 4, nowhere makes use of the word *voluntary ;* it only refers to documents made *for the intent and of purpose to defraud and deceive such person or persons as have or that purchase lands, &c.* And yet strange as it may appear, it very soon became settled law that a subsequent sale to a purchaser for valuable consideration by the settlor raised a legal presumption of fraud in regard to the prior voluntary trust deed, which could not be rebutted.(*a*) The same presumption, however, would not arise from a subsequent sale to a purchaser for value by any other person than the settlor. The principle is clearly explained in *Doe* d. *Newman* v. *Rusham*,(*b*) where it is laid down that the principle on which voluntary conveyances have been held uniformly to be fraudulent and void, as against subsequent purchasers, appears to be that, by selling the property for valuable consideration, the seller so entirely repudiates the former voluntary conveyance and shows his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such

(*a*) See *Godfrey* v. *Poole*, 13 App. Cas. 497 ; *Clarke* v. *Wright*, 6 H. & N. 875.

(*b*) 17 Q. B. 723.

deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them.(*c*) Where the same person executes the voluntary conveyance and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance, it is otherwise for the acts of one man cannot show the mind and intention of another.

Where there is no fraud in fact, two acts by the same person are necessary to render a voluntary conveyance fraudulent under 27 Eliz. c. 4, viz., a voluntary conveyance by the grantor, and a subsequent sale by him to a purchaser for valuable consideration.(*d*)

It was, therefore, held by the House of Lords,(*e*) that a creditor could not seize under an execution any interest in the estate which was vested in another person by voluntary conveyance executed by the judgment debtor, merely on the ground that the settlement was voluntary.

The courts having decided as above stated, that a subsequent sale for valuable consideration raised a legal presumption of fraud which could not be rebutted, it became necessary to pass the statute 56 & 57 Vict. c. 21,(*f*) which enacted that a voluntary conveyance or settlement shall not be deemed fraudulent, and avoided under 27 Eliz. c. 4, by reason of a subsequent purchase for value. And it would appear that since the passing of the Voluntary Conveyances Act, it will be necessary

(*c*) *Doe* d. *Offley* v. *Manning*, 9 East, 59.

(*d*) *Godfrey* v. *Poole*, 13 A. C. 497, 505.

(*e*) *Dolphin* v. *Aylward*, L. R. 2 H. L. 500; *Newman* v. *Rusham*, 17 Q. B. 723.

(*f*) See *ante*, Chapter XVIII.

in each case to prove that the voluntary settlement or conveyance was in fact fraudulent.

The power which arose by virtue of the statute 27 Eliz. c. 4, of defeating a prior voluntary conveyance was confined to the case of *bonâ fide* transfers and sales founded upon valuable consideration.(*a*) Therefore, a voluntary settlement could not be defeated by the will of the settlor,(*b*) nor by any other voluntary instrument made by him.(*c*) Where the consideration received by the voluntary settlor upon the subsequent sale is grossly inadequate to the value of the property conveyed, the transaction will not be looked upon as *bonâ fide*, but as a mere contrivance to get rid of the prior voluntary settlement, which will consequently be unaffected by the sale.(*d*) On the other hand it may be remarked, that a very small consideration will be sufficient to uphold a settlement against subsequent purchasers ; for the courts endeavoured as much as possible to mitigate the injustice which was occasioned by holding every voluntary settlement to be fraudulent within the statute 27 Eliz. c. 4.(*e*)

Of course, if the voluntary settlement contains a power of revocation, it may be revoked by a subsequent

(*a*) *Chadwick* v. *Doleman*, 2 Vernon, 528, 530.

(*b*) *Bale* v. *Newton*, 1 Vernon, 464 ; *Boughton* v. *Boughton*, 1 Atk. 625 ; *Villars* v. *Beaumont*, 1 Vernon, 100 ; *Sear* v. *Ashwell*, 3 Swanston, 411 n ; *Bolton* v. *Bolton*, 3 Swanston, 414 n ; *Howell* v. *Price*, 1 Jur. (N.S.) 494.

(*c*) *Newton* v. *Askew*, 11 Beav. 145 ; *Lanham* v. *Pirie*, 3 Jur. (N.S.) 704 ; *Goodwin* v. *Goodwin*, 1 Ch. Rep. 173 ; *Clavering* v. *Clavering*, 2 Vern. 473 ; *Naldred* v. *Gilham*, 1 P. W. 576.

(*d*) *Metcalfe* v. *Pulvertoft*, 1 V. & B. 184 ; *Doe* d. *Parry* v. *James*, 16 East, 212 ; *Roberts* v. *Williams*, 4 Hare, 130.

(*e*) *Bayspoole* v. *Collins*, L. R. 4 Ch. 228.

voluntary instrument.(*f*) So, also, if it contains a trust for the payment of the settlor's debts, it may be in effect revoked by his contracting debts to so large an amount as to exhaust the trust property ; and in the application of this principle it will make no difference that the debts accrued under voluntary instruments, which were executed by the settlor for the purpose of defeating the settlement.

In *Markwell* v. *Markwell*,(*g*) the settlor, James Markwell, assigned a large amount of personalty(*h*) to trustees, upon trust to pay the dividends, interest, and annual income of the same unto himself and his assigns during his life ; and after his decease, upon trust to pay all debts then owing by him, and also all legacies or sums of money he might bequeath, not exceeding in the whole a certain amount ; and subject as aforesaid, upon trust for W. R. Markwell, his executors, administrators, and assigns, for his and their absolute use and benefit. Subsequently the settlor, *with the intention of defeating the voluntary settlement*, executed several voluntary bonds in favour of his relations ; and it became necessary to consider whether these bonds were fairly debts within the meaning of the settlement ; or whether they were not fraudulent and void against it, on the authority of *Jones* v. *Martin*,(*i*) where it was held that, although a covenant by a father to give or leave by his will all his personal estate equally

(*f*) See *Young* v. *Cottle*, 1 P. W. 101. As to conveyances with power of revocation, see *infra*, Chapter XXVI.

(*g*) 34 Beav. 12.

(*h*) The statute 27 Eliz. c. 4, does not apply to personalty, but the principle of this case seems to include settlements of real property.

(*i*) 5 Ves. 265, n.

among his children does not deprive him of the right of unlimited expense, and of any fair application of the property even by gift, if absolute and *bonâ fide*, nevertheless a disposition made for the express purpose of defeating the covenant cannot stand. The Master of the Rolls decided that the bonds executed by James Markwell were debts both at law and in equity, and payable under the trust for payment of debts in the voluntary settlement.(*a*)

And here it may be remarked that, where a person has a right of instituting a suit to set aside a conveyance on equitable grounds, this right will pass to his grantee upon a subsequent conveyance of the same property. The rule will be the same whether the latter conveyance was voluntary or for valuable consideration, and the transaction will not be void on the ground of champerty. But a sale of the mere right to institute a suit to set aside a conveyance, as well as an agreement to purchase an estate for the purpose of acquiring such right, both partake of champerty and are invalid.(*b*) In *Dickinson* v. *Burrell*,(*c*) a person executed a conveyance of real estate, which was liable to be set aside on equitable grounds. Afterwards he made a voluntary settlement of the same property in trust for himself for life, with remainder to his children. It was held that the children could maintain a suit to set aside the previous voidable conveyance.

Where there is no fraud in fact, a trust deed, when

(*a*) See *Ennis* v. *Smith*, Jones and Carey's Reports, 400 ; *In re M'Kenna's Estate*, 13 Ir. Ch. Rep. 239.

(*b*) *Dickinson* v. *Burrell*, L. R. 1 Eq. 337 ; *De Hoghton* v. *Money*, L. R. 2 Ch. App. 164 ; L. R. 1 Eq. 154.

(*c*) See last note.

executed, although it may be voluntary, is not of itself fraudulent in law.(*d*)

As a voluntary settlement is binding on the settlor and those claiming under him, and cannot be revoked by another voluntary deed or by a will executed by him, it follows that after the execution of the voluntary instrument he has no estate left in him which he can transmit to his heir or devisee, and consequently that a sale by the heir or devisee to a purchaser for valuable consideration is no avoidance of a voluntary settlement made by the ancestor or testator. In other words, that the voluntary instrument and the subsequent conveyance for value which defeated it by virtue of the statute 27 Eliz. c. 4, must have been executed by one and the same person. A leading case on this point is *Doe* d. *Newman* v. *Rusham*,(*e*) where Lord CAMPBELL, in a judgment quoted in an earlier part of this chapter, after reviewing the cases on this subject, and showing the monstrous evils which would result if an heir, already well provided for, could defeat a settlement by the ancestor in favour of the younger members of his family, said : "There is, indeed, a difference between the case of a purchaser from an heir and that of a purchaser from a devisee, that, in the former case, the ancestor has done no act whereby he has shown any intention to repudiate his voluntary conveyance, whereas, in the latter, the testator has done such an act by the

(*d*) *Godfrey* v. *Poole*, 13 A. C. 497 ; *Clarke* v. *Wright*, 6 H. & N. 875.

(*e*) 17 Q. B. 723 ; *Parker* v. *Carter*, 4 Hare, 409 ; *Lewis* v. *Rees*, 3 K. & J. 132 ; *Jones* v. *Purfroy*, 1 Vernon, 46 ; *Adney* v. *Field*, Ambler, 654 ; *Godfrey* v. *Poole*, 13 A. C. 497 ; *In re Barker's Estate*, 44 L. J. Ch. 487.

devise in his will. But that act of devising does not show any intention in his mind to sell the property, nor that his devisee shall sell it. It does not show that he at any time contemplated a sale; and, therefore, it cannot, by reference to the time of the voluntary conveyance being made, raise the inference that he intended to defraud purchasers. In truth neither heir nor devisee in such a case has any estate in him, and, therefore, cannot possibly pass any to a purchaser."

Burrel's Case,(*a*) which is generally cited as an authority for the proposition that the heir or devisee may by a sale defeat a voluntary settlement made by the ancestor or testator, is commented on by Lord CAMPBELL in *Doe* v. *Rusham;* and shown not to warrant the conclusion drawn from it and stated in the sidenote. The cases of *Warburton* v. *Loveland*(*b*) and *Blake* v. *Hyland*,(*c*) in which *Burrel's Case*, as commonly received, is cited with approval, arose under the Registry Acts, and are not to be treated as authorities on the construction of the statute 27 Eliz. c. 4.

As a voluntary settlement is binding on the settlor, and was avoided by the statute only so far as was necessary to make good the subsequent sale for valuable consideration, it might not unreasonably have been expected that equity would have favoured the claim of the parties entitled under the settlement to have the purchase-money received upon the sale laid out upon the old trusts. It is, however, decided that the voluntary

(*a*) 6 Rep. 72 b; *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1055; see Sugden, V. & P. 713 (14th edit.).

(*b*) 6 Bligh (N.S.) 30, 31.

(*c*) 2 Dr. & Wal. 397, 407.

grantees have no such right.(*d*) The only case which lays down a different rule, and decides that the purchase-money ought to be settled, is *Leach* v. *Dene*,(*e*) which is an old case, and at variance with all the later authorities. Of course, after the avoidance of the voluntary settlement by a subsequent sale the parties claiming under the settlement will have a right of action at law against the settlor on his covenants for title, if there are any in the deed.(*f*) And it also appears clear that the voluntary grantees will be entitled to a charge or lien upon the settled estate for all permanent improvements made by them during the continuance of their possession.(*g*)

(*d*) *Townend* v. *Toker*, 1 Ch. App. 446; *Daking* v. *Whimper*, 26 Beav. 568; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 91, 93; *Buckle* v. *Mitchell*, 18 Ves. 112; *Evelyn* v. *Templar*, 2 Bro. C. C. 148; *In re Walhampton Estate*, 26 Ch. D. 391.

(*e*) 1 Ch. Rep. 78; cited in full in the note to *Townend* v. *Toker*, 1 Ch. App. 446, 461.

(*f*) See *Williamson* v. *Codrington*, 1 Ves. sen. 516.

(*g*) See 2 "Story on Equity," §§ 1237, 1239; *Stepney* v. *Biddulph*, 13 W. R. 576; *Trevelyan* v. *White*, 1 Beav. 588.

CHAPTER XXI.

To what kind of Property the Statute 27 Eliz. c. 4, refers.

PERSONAL property (with the exception of chattels real which are expressly mentioned) is not within the statute ;(*a*) in this respect it differs from 13 Eliz. c. 5, which, as we have seen, applies to personal property, and, therefore, a voluntary settlement of chattels or stock cannot be avoided by a subsequent sale for valuable consideration. For by the common law an estate made by fraud shall be avoided only by him who had a former right, title, interest, debt, or demand ; but not by him whose right has accrued since the fraudulent assurance was made.(*b*)

The statute only applies to *real* estate and interests in land, whether legal or equitable, corporeal or incorporeal, and therefore leaseholds,(*c*) advowsons,(*d*) and rent-charges or annuities issuing out of land(*e*) are within the statute.

A purchase in the name of a wife or child is not within the statute, because it is said that the purchase-money might have been given to the wife or child for

(*a*) *Jones* v. *Croucher*, 1 S. & S. 315 ; *Meek* v. *Kettlewell*, 1 Hare, 473 ; *Bill* v. *Cureton*, 2 M. & K. 503 ; *Barton* v. *Vanheythuysen*, 11 Hare, 132.

(*b*) *Upton* v. *Basset*, cited in *Twyne's Case*, 3 Rep. 80 a, 83 a, b.

(*c*) *Price* v. *Jenkins*, 5 Ch. D. 619.

(*d*) *Hill* v. *Bishop of Exeter*, 2 Taunt. 69.

(*e*) *Garth* v. *Enfield*, Serjeant Bridgman's Reports, p. 22, cited 11 Hare, 132 ; *Poulton* v. *Wiseman*, Noy. 105.

the purpose of enabling them to buy the estate for themselves.(*f*) In *Lady George's Case*,(*g*) Lord LINCOLN purchased a manor in his daughter's name, and afterwards kept courts and made leases in his own name. He then sold the manor for valuable consideration, and died. The daughter never questioned the sale till after her father's death. But it was held that, unless some fraud were discovered, the case was not within 27 Eliz. c. 4, although there might be badges of fraud ; and that, therefore, the settlement on the daughter was unaffected by the subsequent sale.

But where a parent, after having entered into a contract for the purchase of an estate, directs it to be conveyed to a child, the same principle will not apply ; for this is not a purchase in the name of a child but in the parent's own name, and a transfer of his equitable interest under the contract to the child.(*h*)

Copyholds are within the statute ;(*i*) for copyholds are within the general words of a statute which does not alter the service, tenure, custom, or interest of the land, to the prejudice of the lord or copyholder.(*k*)

(*f*) Sugden, V. & P. 705 (14th edit.); "Roberts on Voluntary Conveyances," 465 *et seq.* ; 11 Hare, 130.

(*g*) Cited Cro Car. 550 ; and see *Redington* v. *Redington*, 3 Ridgw. P. C. 106 ; *Drew* v. *Martin*, 33 L. J. Ch. 367.

(*h*) 8 Jarman & Bythewood, Conv. 154, note; *Barton* v. *Vanheythuysen*, 11 Hare, 126.

(*i*) *Doe* d. *Tunstall* v. *Bottriell*, 5 B. & Ad. 131 ; *Currie* v. *Nind*, 1 M. & Cr. 17 ; *Foster* v. *Lister*, 6 Ch. D. 87 ; *Doe* v. *Routledge*, Cowper, 710 ; *Doe* d. *Baverstock* v. *Rolfe*, 8 A. & E. 650.

(*k*) "Watkins on Copyholds," vol. ii., ch. 10 ; *Heydon's Case*, 3 Rep. 8 a ; Comyn, Dig. (N.), Copyhold.

CHAPTER XXII.

Who is a Purchaser within the meaning of the Statute 27 Eliz. c. 4.

In perusing this chapter the reader is warned to be careful to remember that it deals with the state of the law prior to the passing of the Voluntary Conveyances Act, 1893 (see Chapters XIX. and XX.), and is, therefore, to some extent obsolete. In order to upset a voluntary deed at the present day it must be shown that it was made with intent to defeat the purchasers. There is no such thing nowadays as fraudulent intent implied from the fact of a subsequent conveyance for value.

It has been shown in a previous chapter(*a*) that a voluntary conveyance can only be defeated by virtue of the statute 27 Eliz. c. 4, when the subsequent sale or transfer for value is made by the voluntary grantor himself; and that, consequently, persons claiming under the grantor's heir or devisee are not purchasers within the meaning of the statute.

A purchase of lands to prevail over a prior voluntary settlement of the same property must be both *bonâ fide*, and founded on valuable consideration. If the purchase is so greatly at an undervalue as to indicate that it is not a *bonâ fide* transaction, but a mere contrivance to defeat the voluntary settlement by an instrument which is in truth voluntary itself, then the interest of parties claiming under the settlement will not be affected.(*b*)

(*a*) See Chapter XX.

(*b*) *Doe* d. *Parry* v. *James*, 16 East, 212; *Roberts* v. *Williams*, 4

An inquiry has been made in a former part of this work as to what will furnish a consideration sufficient to support a settlement against creditors and subsequent purchasers.(*c*) It has been shown that not only where the consideration consists of marriage or money, but also where the settlement is the result of an arrangement or bargain whereby some special benefit is received by the settlor, such as the suspension of litigation, the payment of his debts, or the like, then the parties claiming under the settlement are purchasers for valuable consideration.

A settlement or conveyance of real estate which is *bonâ fide*, and supported by any of these considerations, would under the old law and even without fraudulent intent being proved, prevail over a prior voluntary assurance made by the same grantor; and the parties claiming under the settlement or conveyance would be purchasers within the meaning of the statute 27 Eliz. c. 4.

In *Douglasse* v. *Waad*,(*d*) a husband during the life of his first wife made a voluntary settlement of lands upon himself for life, with remainder to his first and other sons in tail. His first wife died without issue. Upon his second marriage he settled a jointure of 300*l.* a year upon his wife, by whom he had issue a son, the defendant. The son survived his father, and so did his mother, who subsequently married the plaintiff. Upon a bill brought by the second wife and her husband

Hare, 130; *Metcalfe* v. *Pulvertoft*, 1 V. & B. 184; *Doe* v. *Routledge*, Cowp. 705.

(*c*) *Supra*, Chapters I.—VI.

(*d*) 1 Ch. Ca. 99; and see "Cruise's Digest," tit. vii., ch. ii. §§ 1, 7.

against the defendant, praying that the voluntary settlement might be declared void, and that the rentcharge might be raised for the wife's benefit, it was held that the valuable consideration of marriage made the wife a purchaser of the jointure within the 27 Eliz. c. 4, and that, therefore, she was entitled to be relieved against the prior settlement. In *Hill* v. *The Bishop of Exeter*,(*a*) Charles Hill, being seised in fee of the advowson of a vicarage (except the next presentation, which belonged to one Robert Cook), in consideration of natural love and affection, conveyed the said advowson in fee to his son, the plaintiff. Upon the next vacancy occurring, Samuel May claimed title to the advowson, and contested the next presentation against Robert Cook in a *quare impedit*. A compromise of this suit was entered into between Cook, May, and Charles Hill, whereby it was agreed that May should release his claims to Cook and Charles Hill according to their respective interests, and that Charles Hill should convey to May the then next following presentation, which he did. The presentee of Cook was thereupon instituted and inducted into the vicarage. Upon the next avoidance the plaintiff claimed to present, and, upon his claim being resisted by May, brought a *quare impedit* against him and the bishop. The court decided in favour of the defendants, on the ground that the release by May of his claims upon the advowson furnished a valuable consideration to support the conveyance to him of the next presentation; and that, therefore, the voluntary conveyance to the plaintiff was void against May as a subsequent purchaser within 27 Eliz. c. 4.

Where a binding and irrevocable trust has been

(*a*) 2 Taunton, 69.

created of real estate in favour of creditors,(*b*) they are purchasers within the statute, and may avoid all prior voluntary charges made by the debtor upon the same property.(*c*)

A lessee at a rack rent is a purchaser within the statute,(*d*) but not a lessee without fine or rent ;(*e*) and the principle may be extended to the case of a lessee who has paid a fine for his lease, if the amount of the fine was adequate to the value of the lease.(*f*) In *Shaw* v. *Standish*,(*g*) Sir Richard Standish was seised in fee of an estate supposed to contain lead ore, and being minded to take the plaintiffs and another into partnership with him in managing all mines which might be discovered in any part of the estate, an agreement was entered into between the before-mentioned parties which was to last for twenty-one years ; the partners were to share the profit and loss in certain proportions, and Sir Richard was to have part of the profit which accrued to the others in recompense of his title to the soil and royalty. The partnership sought for mines ; and, after two years' search and an expenditure of 120*l.*, they discovered a valuable mine, and worked it for the space of three months. Then Sir Richard died, and Lady Standish and her son (the

(*b*) See *Ellison* v. *Ellison*, 6 Ves. 656 ; and notes in "White & Tudor's Leading Cases."

(*c*) *Butterfield* v. *Heath*, 15 Beav. 408 ; see also *Cadell* v. *Bewley*, 15 W. R. 703 ; *Leech* v. *Leech*, 1 Ch. Ca. 249.

(*d*) *Goodright* d. *Humphreys* v. *Moses*, 2 W. B. 1019 ; and *per* Lord MANSFIELD in *Keech* v. *Hall*, 1 Douglas, 22 ; *Moore* v. *Crofton*, 3 Jo. & Lat. 438.

(*e*) *Upton* v. *Basset*, Cro. Eliz. 445.

(*f*) *Cross* v. *Faustenditch*, Cro. Jac. 181.

(*g*) 2 Vernon, 326.

defendants) set up a post-nuptial settlement by Sir Richard on his wife and children, made some twelve years before the articles of partnership were entered into. It thereupon became necessary to consider whether the plaintiffs were purchasers of an equitable interest in the mines within the statute 27 Eliz. c. 4; and the court inclined to think that they were, and established the articles against the voluntary settlement.(*a*)

An assignee of a lease is also a purchaser within the statute.(*b*) Very small consideration sufficed to remove a *bona fide* settlement from the category of voluntary settlements for the purposes of the Act of Elizabeth, far less than will suffice to support a settlement made by an insolvent as against his creditors.(*c*)

It was held in the case of *Price* v. *Jenkins*(*d*) that a settlement of leaseholds to which a liability to pay rent and perform covenants was attached was, from the nature of the property, based on value; for the beneficiaries took upon themselves the discharge of those liabilities. Several writers have questioned this case and expressed a doubt if it would be followed in the House of Lords.

(*a*) See *Gardiner* v. *Gardiner*, 12 Ir. C. L. Rep, 565, from which it appears that the mere existence in an assignment of leaseholds of a covenant by the assignee to indemnify the lessee against the rent and covenants is not *per se* such a valuable consideration as, under 27 Eliz. c. 4, will support the assignment against subsequent purchasers.

(*b*) *Colville* v. *Parker*, Cro. Jac. 158.

(*c*) *Re Ridler*, 22 Ch. D. 74; *Rosher* v. *Williams*, L. R. 20 Eq. 210; *Re Hillman*, 10 Ch. D. 622; but see *Harris* v. *Tubbs*, 42 Ch. D. 79.

(*d*) 5 Ch. D. 619; but see *Lee* v. *Matthews*, L. R. 6 Ir. 530, and *Gardiner* v. *Gardiner*, *ante*.

The decisions in *Price* v. *Jenkins* has no application were leaseholds are settled by way of sub-demise as no onus is thereby imposed on the trustees.(*e*)

A mortgagee, whether legal or equitable,(*f*) is a purchaser within the statute; and, therefore, a previous voluntary settlement will be void against him to the extent of his security.(*g*) But it must be satisfactorily proved that an advance of money was actually made to the mortgagor. Declarations by him are not admissible, after his death, to prove this fact;(*h*) for a voluntary settlement is binding on the settlor, and therefore, he cannot, after having parted with his interest, defeat the estates which he has given to the voluntary grantees by statements and admissions. It must be shown that the money was actually advanced.

If a mortgagee afterwards obtains from the mortgagor another security, he is not allowed to consolidate his two securities so as to throw on the estate subject to the settlement any part of the sum which may be owing to him beyond that originally charged thereon. In *In re Walhampton Case*(*i*) and in *Hales* v. *Cox*,(*k*) it was held that persons claiming under a voluntary settlement had a right to marshal the mortgages of the estate

(*e*) *Shurmur* v. *Sedgwick*, 31 W. R. 884.

(*f*) *Doe* v. *Webber*, 1 A. & E. 733; *Dolphin* v. *Aylward*, 4 H. of L. 486; *Ede* v. *Knowles*, 2 Y. & C. C. 172.

(*g*) *Chapman* v. *Emery*, Cowper, 401; see *Roche* v. *Hassard*, 5 Ir. Ch. Rep. 14; *Dolphin* v. *Aylward*, L. R. 4 H. L, 486; as to equitable mortgages by deposit, see *Lister* v. *Turner*, 5 Hare, 281; *Buckle* v. *Mitchell*, 18 Ves. 100; *Rosher* v. *Williams*, 20 Eq. 210.

(*h*) See 1 "Taylor on Evidence," 593 (4th edit.).

(*i*) 26 Ch. D. 391.

(*k*) 32 Beav. 118.

under a subsequent mortgage which included other property.

In *Doe* d. *Sweetland* v. *Webber*,(*a*) a husband made a voluntary settlement of real estate upon his wife. Subsequently he conveyed the same property to some bankers as a security for future advances. No money passed at the time the mortgage was executed, and certain declarations made by the mortgagor during proceedings in bankruptcy were the only proof of any money having been at any time lent to him by the mortgagees, or of there being anything due to them upon the security. In ejectment brought by the voluntary grantee against the mortgagees after the mortgagor's death, it was held, by the Court of Queen's Bench, that these declarations of the mortgagor were not admissible in support of the mortgage. LITTLEDALE, J., said: "The evidence in question might have been good as against the mortgagor himself, but cannot be admitted to affect the interest of third persons under the settlement. For that purpose there should have been proofs of actual advance of money by the mortgagee to the mortgagor." And Lord DENMAN said:(*b*) "A voluntary settlement cannot be set aside or questioned without evidence of a subsequent purchase for valuable consideration. Of that consideration there ought to be clear legal proof. The evidence which has been given here consists, at the highest, of declarations by the mortgagor, and I take it to be clear upon general principle that a person who had parted with all his interest cannot by any declaration of his, *subsequently made*, derogate from the estate which he has conveyed; and that it is only by declarations made *while*

(*a*) 1 A. & E. 733. (*b*) 3 N. & M. 596.

the interest is in him that he can bind those claiming under him."(*c*)

But an equitable mortgagee by deposit of title deeds is not considered *at law* as a purchaser.(*d*) In equity a different rule prevails, and, therefore, the title of the equitable mortgagee will prevail over a previous voluntary settlement made by the mortgagor. In *Lister* v. *Turner*,(*e*) W. Slater deposited with the Bank of Liverpool the title deeds of an estate, as security for the balance due or to become due (not exceeding 2,000*l.*) from him or his firm to the bank. By an agreement in writing accompanying the deposit he agreed to execute a legal mortgage of the property with a power of sale. Previously to his transactions with the bank, W. Slater had executed a voluntary settlement of the estate to which the title deeds related in favour of his wife and children. It was held, that the equitable mortgagee was a purchaser within the statute 27 Eliz. c. 4, and he, therefore, prevailed over the voluntary grantees.

As a voluntary settlement is only void against a subsequent mortgage to the extent of the security effected by it, the voluntary grantee has a right to redeem upon payment of the mortgage money and interest.(*f*)

A judgment creditor is not a purchaser within the statute 27 Eliz. c. 4 ; for by the word purchaser, as there used, is meant one who gives money or other

(*c*) 1 "Taylor on Evidence," 593 (4th edit.).

(*d*) *Kerrison* v. *Darrien*, 9 Bingham, 76.

(*e*) 5 Hare, 281.

(*f*) "Fisher on Mortgage" (4th edit.), 716 ; *Rand* v. *Cartwright*, Nelson, 101 ; *Thorne* v. *Thorne*, 1 Vernon, 182 ; *Barthrop* v. *West*, 2 Ch. Rep. 62 ; *Howard* v. *Harris*, 1 Vernon, 193.

valuable consideration in order to have the land.(*a*) This is not the case with a judgment creditor, to whom an *elegit* is only a resource in the event of his not being able to get satisfaction out of the debtor's personalty. The real position of a judgment creditor may be well illustrated by what is said in the case of *Brace* v. *The Duchess of Marlborough*,(*b*) namely, that where a first mortgagee makes a further advance to the mortgagor upon the security of a statute or judgment, he may tack the statute or judgment to his mortgage ; for it is to be presumed that, having the land in his possession, he made the further advance on the security of it, and intended to hold it until both sums were satisfied ; but that where a creditor by judgment, statute or recognizance buys in the first mortgage, he cannot tack his judgment, &c., to the mortgage, because he did not lend his money on the credit of the land, and, therefore, does not stand in the position of a purchaser.

The two early cases of *Girling* v. *Lowther*(*c*) and *Garth* v. *Enfield*,(*d*) which have sometimes been cited as authorities for the contrary doctrine, viz., that a judgment creditor is a purchaser within the statute, may be considered as overruled since the case of *Beavan* v. *Lord Oxford*,(*e*) where they are commented upon by the Lord Chancellor.

The position of a judgment creditor with reference to

(*a*) *Per* Lord CRANWORTH in *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507 ; *Benham* v. *Keane*, 31 L. J. Ch. 129 ; *Kindersley* v. *Jervis*, 25 L. J. Ch. 538.

(*b*) 2 P. W. 491 ; cited in *Ex parte Knott*, 11 Ves. 617.

(*c*) 2 Rep. in Ch. 136.

(*d*) Bridg. 22.

(*e*) *Supra*, note (*a*). See, however, the judgment of WOOD, V.C., in *Barton* v. *Vanheythuysen*, 11 Hare, 126.

the statute 27 Eliz. c. 4, is not improved by the 13th section of the statute 1 & 2 Vict. c. 110,(*f*) which makes a judgment a charge upon all lands and hereditaments, of or to which the judgment debtor, at the time of entering up the judgment or at any time afterwards, shall be seised or entitled for any estate or interest whatever, either in law or equity, or over which the said debtor shall, at the time of entering up the judgment or at any time afterwards, have any disposing power which he may without the assent of any other person exercise for his own benefit. For, as a voluntary settlement is binding on the settlor, and cannot be revoked by him (except in favour of a subsequent purchaser for valuable consideration by virtue of the statute), he is not considered as having a disposing power which he may exercise for his own benefit.(*g*) And a judgment only attaches upon such interest or estate as the debtor had left in him at the time of entering up the judgment, and is not allowed to affect any prior estate or equity which the debtor may have created in favour of third parties, although volunteers, where there is no proof of fraud.(*h*)

(*f*) Corresponding with section 22 of 3 & 4 Vict. c. 105 (the Irish Act). See *Evans* v. *Evans*, 2 Ir. Ch. Rep. 242; *Hyde* v. *Atkinson*, 2 Ir. Ch. Rep. 246. By 27 & 28 Vict. c. 112 (1864), judgments entered up after the passing of the Act are not to affect land until it has been actually delivered in execution. The Act does not apply to Ireland.

(*g*) The same observation applies to section 11 of the same statute. See *Beavan* v. *Lord Oxford*, 6 De G. M. & G. 507.

(*h*) *Whitworth* v. *Gaugain*, 3 Hare, 416; *Langton* v. *Horton*, 1 Hare, 549; *Bearcliffe* v. *Dorrington*, 4 De G. & S. 122; *Beavan* v. *Earl of Oxford*, 6 De G. M. & G. 507; *Pickering* v. *Ilfracombe Railway Company*, L. R. 3 C. P. 235.

In *Dolphin* v. *Aylward*,(*a*) a person who was seised in fee of real estate made a voluntary settlement upon himself for life, with remainder over to his children. He subsequently incumbered the estate with mortgages, which were paid off partly out of his life estate and partly by sale of the inheritance. After the settlor's death certain persons, who had obtained judgments against him since the date of the voluntary settlement, took proceedings in Chancery to have it declared that the mortgages ought to be paid out of the inheritance in exoneration of the life estate. But it was held, that the doctrines of equity relating to the marshalling of securities could not be applied to such a case, inasmuch as the judgment creditors were not purchasers for valuable consideration within the 27 Eliz. c. 4, and, therefore, could not disturb the estates created by the voluntary settlement.

A husband acquiring an estate in his wife's property, by virtue of his marital right, does not take as a purchaser within the meaning of the statute under consideration. "In truth," as JERVIS, C.J., said, in *Doe* d. *Richards* v. *Lewis*,(*b*) "he takes the estate at a moment when he has parted with the opportunity of becoming a purchaser."

(*a*) L. R. 6 H. L. 486.
(*b*) 11 C. B. 1055 ; "Comyn's Digest," Chancery, 4 I. 2.

CHAPTER XXIII.

As to how far Equity will interfere in case of a subsequent Sale of the Property comprised in a Voluntary Settlement of Real Estate.

As a voluntary settlement is binding upon the settlor, equity will not lend him its assistance if he attempts to defeat it under the statute 27 Eliz. c. 4, by a subsequent conveyance for valuable consideration. Therefore, the voluntary settlor cannot enforce specific performance of a contract for sale against a subsequent purchaser;(*c*) unless there are some special circumstances, such as part performance, making it inequitable for the purchaser to refuse to complete.(*d*)

In the case of volunteers equity remains neutral. As, on the one hand, it will not assist a voluntary settlor of real estate to defeat the settlement; neither will it, on the other, prevent him from selling the property comprised in the settlement by issuing an injunction at the suit of the voluntary grantees.(*e*)

But specific performance will be granted in favour of purchasers for value from the voluntary settlor, because the settlement is void against them by virtue of the statute 27 Eliz. c. 4.(*f*)

(*c*) *Smith* v. *Garland*, 2 Meriv. 123; *Johnson* v. *Legard*, 3 Madd. 283; *Clark* v. *Willmott*, L. R. 7 Ex. 313; *General Meat Supply Association* v. *Bouffler*, 41 L. T. 719; Sugden, V. & P. 720 (14th edit.).

(*d*) *Peter* v. *Nicholls*, L. R. 11 Eq. 391.

(*e*) *Smith* v. *Garland*, 2 Meriv. 123; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.

(*f*) *Buckle* v. *Mitchell*, 18 Ves. 100; *Leach* v. *Dean*, 1 Ch. Rep.

A voluntary settlor of real estate will not be restrained from selling the property settled merely because a suit is depending between himself and the parties claiming under the settlement respecting its validity. And, therefore, if the purchaser file a bill against the voluntary settlor and his grantees to enforce the sale, a plea in bar by the grantees that the purchase was made pending a suit preferred by them against the settlor to have the settlement carried into effect, of which suit the purchaser had notice, will be overruled.(*a*)

Although it is clear that a voluntary settlor cannot file a bill against a subsequent purchaser to compel specific performance of the contract of sale, it was left open to doubt in *Johnson* v. *Legard*,(*b*) whether the settlor's creditors after his death might not stand in a better position, and compel the purchaser to complete. It would seem, however, that the creditors could have only such rights as the settlor himself had, and could not, under such circumstances, compel specific performance.

Notwithstanding the fact that a purchaser of real estate for valuable consideration may enforce specific performance against a voluntary settlor who sold to him, it is seldom that a purchaser can be advised to accept a title where a prior voluntary settlement has been made of the same property.(*c*) Because, although

78; *Douglasse* v. *Waad*, 1 Ch. Ca. 99; *Parry* v. *Carwarden*, Dickens, 544; *Dakin* v. *Wimper*, 26 Beav. 568; *Rosher* v. *Williams*, 20 Eq. 210; *Bennet* v. *Musgrove*, 2 Ves. 51; *Oxley* v. *Lee*, 1 Atk. 625; *Willats* v. *Busby*, 5 Beav. 193; *Lister* v. *Turner*, 5 Hare, 581; *Stackpoole* v. *Stackpoole*, 4 Dr. & War. 320.

(*a*) *Metcalfe* v. *Pulvertoft*, 2 V. & B. 209.

(*b*) T. & R. 281.

(*c*) Sugden, V. & P. 720 (14th edit.).

no objection can be raised to a title *merely* because it depends for its validity on the avoidance of a voluntary settlement under the statute 27 Eliz. c. 4,(*d*) still it is open to the parties claiming the benefit of the settlement to show that, although no consideration appears on the face of it, yet that valuable consideration in fact passed from them to the settlor. The rule is, that if no consideration is expressed in a bond or deed, it may be supported by proof that a valuable consideration was in reality given by the obligee or grantee, or by some person on their behalf;(*e*) and that where a consideration does appear in the body of the instrument, proof may be given of any other consideration which is not in contradiction to or inconsistent with the consideration expressed.(*f*) It is no contradiction to show that the consideration was, in fact, larger than is actually stated.(*g*)

If a settlement is expressed to be made out of natural love and affection and for divers other good and

(*d*) *Currie* v. *Nind*, 1 M. & C. 17; *Butterfield* v. *Heath*, 15 Beav. 408.

(*e*) *Clarkson* v. *Hanway*, 2 P. W. 204, and cases in the note; *Doe* v. *Sherlock*, 2 Fox & Sm. 90; *Graham* v. *O'Keefe*, 16 Ir. Ch. Rep. 1; *Harman* v. *Richards*, 10 Hare, 81. If a person undertakes to show that a deed is founded upon valuable consideration and fails in his proof, he cannot afterwards set up the instrument as a voluntary gift. *Ramsden* v. *Jackson* 1 Atk. 292; *Bridgman* v. *Green*, 2 Ves. 627; *Lechmere* v. *Earl of Carlisle*, 3 P. W. 222; *Sanders* v. *Graves*, 1 Dickens, 93.

(*f*) *Pott* v. *Todhunter*, 2 Coll. 76; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228.

(*g*) *Clifford* v. *Turrill*, 1 Y. & C. C. C. 138; *Nixon* v. *Hamilton*, 2 Dr. & Wal. 364; *Tanner* v. *Byne*, 1 Simon, 160; *Gale* v. *Williamson*, 8 M. & W. 405; *In re The British and Foreign Cork Company*, 11 Jur. (N.S.) 941.

valuable considerations, the court will direct an inquiry as to whether any and what valuable consideration was received by the settlor. *Primâ facie*, such a settlement is voluntary, and the onus of proving that value was given is cast upon those who are interested in upholding the instrument.(*a*)

In *Bayspoole* v. *Collins*,(*b*) the owner of a freehold estate, which was worth, beyond a mortgage to which it was subject, about 1,300*l*., was persuaded by A., a relative of his wife, to make a post-nuptial settlement of it on his wife and children. As an inducement to do this, A. agreed to advance him 150*l*. on his promissory note to meet arrears of interest due on the mortgage. The settlement was accordingly executed; but no mention was made of the advance of the 150*l*. A subsequent mortgagee having brought an action to establish priority over the settlement, it was held that the advance of 150*l*. was sufficient valuable consideration to support the settlement under 27 Eliz. c. 4.

In *Ferrers* v. *Cherry*,(*c*) it was held that a purchaser could not avoid a post-nuptial settlement which was made in pursuance of articles before marriage, although the existence of the articles was unknown to him, either by recital or otherwise; and that it was incumbent on him to protect himself by making inquiries of the parties claiming under the settlement, as to whether it was voluntary or founded upon valuable consideration.

(*a*) Sugden, V. & P. 720 (14th edit.); *Kelson* v. *Kelson*, 10 Hare, 385; *Gully* v. *Bishop of Exeter*, 2 Moo. & P. 266; *Harman* v. *Richards*, 10 Hare, 81; *Bedford* v. *Gibson*, 9 Mod. 412; 1 "Hayes on Conveyancing," 451.

(*b*) L. R. 6 Ch. 228.

(*c*) 2 Vernon. 384.

CHAPTER XXIV.

Concerning the Forfeiture Clauses in the Statutes 13 Eliz. c. 5, and 27 Eliz. c. 4.

By section 3 of the statute 27 Eliz. c. 4, the parties to the fraudulent instrument, who attempt to support the same as founded on good consideration and *bonâ fide*, whereby a subsequent purchaser is disturbed or hindered, are to forfeit one year's value of the lands and hereditaments comprised in the fraudulent assurance; one moiety of which goes to the Queen, and the other moiety to the parties grieved by the fraudulent transaction.

In the other statute there is a similar clause (section 2), only that the provisions of the statute 13 Eliz. c. 5, extend not only to fraudulent assurances of lands, but also to fraudulent assignments of goods and chattels, and to covinous bonds, suits, judgments, &c. The penalty under this Act with respect to lands is the same as under the other statute, namely, one year's value; but, with respect to goods and chattels, the forfeiture extends to their entire value; and, in the case of bonds, to the whole of the money contained in them. The money forfeited is divided as before, between the Crown and the parties grieved.

Upon conviction, under either statute, the parties to the fraudulent instruments are to suffer one half-year's imprisonment, without bail or mainprize.(*d*)

(*d*) Upon these sections of the statutes see the remarks of Lord Mansfield in *Doe* v. *Routledge*, Cowper, 705, 710; and of Lord Justice Turner in *Oliver* v. *King*, 8 De G. M. & G. 110, 117.

By 22 Vict. c. 32, the Crown is empowered to remit the payment of any sum of money which may be imposed by statute as a penalty or forfeiture upon a convicted offender, although such money may be payable in whole or in part to persons other than the Crown; and the royal mercy may be extended to any person who may be imprisoned for non-payment of any sum of money so imposed, although the same may be payable to some persons other than the Crown.

The word "bonds" in the latter part of the 2nd section of the statute 13 Eliz. c. 5, includes suits, judgments, and executions, which are mentioned at the commencement of the section.(*a*) And as the forfeiture in the case of a fraudulent disposition of lands under both statutes is expressly limited to one year's value, it will not extend to the *consideration money* alleged to have been received upon a fraudulent sale.(*b*)

The statute 13 Eliz. c. 5, extends to assignments made by a tenant of a manor in order to defraud the lord of his heriot. If a tenant who holds of several lords makes an assignment to defraud them of their heriots, then each lord may have an action *qui tam*, and recover half the value of the goods fraudulently assigned.(*c*)

It is decided by the case of *Wich* v. *Parker*,(*d*) that, in consequence of the penal clause contained in the

(*a*) *Meux* v. *Howell*, 4 East, 1, 15.

(*b*) *Butcher* v. *Harrison*, 4 B. & Ad. 129; *Meux* v. *Howell*, *supra*.

(*c*) 2 "Watkins on Copyholds," 169—172; but see *Creswell* v. *Cokes*, 3 Dyer, 351 (b); where it is said that each lord shall recover only the value of the heriot due to him; and see "Scriven on Copyholds," 267, n. (*x*), 5th edit.

(*d*) 22 Beav. 59; see *Short* v. *Mercier*, 2 De G. & S. 635; *Bartlett* v. *Lewis*, 9 Jur. (N.S.) 202.

statute 13 Eliz. c. 5, a defendant may decline to answer any portion of a bill which is filed against him in order to set aside a conveyance as fraudulent under that Act. This case, however, was not followed in *Bunn* v. *Bunn*,(*e*) where Lord Justice KNIGHT BRUCE said that he believed it not to be the practice of the court to allow the provisions of the statute of Elizabeth to be used as a defence against discovery in a case of disputed fraud. In *Michael* v. *Gay*,(*f*) a judgment debtor, who had executed an assignment which had the effect of defeating the execution of a creditor, was examined in the witness box as to the real nature and object of the transaction. He was, however, admonished by the judge, that he was not bound to answer, as he might thereby criminate himself, and expose himself to prosecution under the statute of Elizabeth for a conspiracy to defraud his creditors.

Of course where no fraud is found no forfeiture will take place. Thus, it has been shown that it is not fraudulent for a debtor (not coming within the bankruptcy laws) to prefer one creditor to another, although an execution may be about to issue against him at the instance of the creditor who is postponed.(*g*) And where a landlord, knowing that an execution was about to issue against his tenant, took the lease off the tenant's hands, and forgave him the rent, which was much in arrear and could not otherwise have been paid, it was held, that the transaction being *bonâ fide*, the penalties were not payable.(*h*)

(*e*) 12 W. R. 561. (*f*) 1 F. & F. 409.

(*g*) *Supra*, Chapter XI.

(*h*) *Lynch* v. *Coppinger*, 14 W. R. 863; see *Meux* v. *Howell*, 4 East, 1.

The parties grieved with these sections of the statutes of Elizabeth are the subsequent purchasers, creditors and others, who are defrauded or delayed by the covinous conveyance, assignment or bond, as the case may be. The assignees in bankruptcy of an insolvent debtor are parties grieved within 13 Eliz. c. 5, for they represent the creditors. They may, therefore, sue for the penalties imposed by that statute.(*a*)

These forfeitures are expressly made recoverable in the Queen's Courts of Record by action of debt, bill, plaint, or information.(*b*) A party grieved within the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4, may lay his information in any county he pleases, for he is not a common informer within the statutes 31 Eliz. c. 5, and 21 Jac. 1, c. 4, which restrain common informers from bringing their actions in any county except the one in which the offence was committed.(*c*)

(*a*) *Butcher* v. *Harrison*, 4 B. & Ad. 129; *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531.

(*b*) *Cresswell* v. *Cokes*, 2 Leon. 8; *Twyne's Case*, 3 Coke, Rep. 80 b.

(*c*) *Allen* v. *Stear*, Cro. Eliz. 645; *Calliford* v. *Blawford*, 1 Shower, 353; *Fife* v. *Bousfield*, 6 Q. B. 100; *Robinson* v. *Currey*, 7 Q. B. D. 465.

CHAPTER XXV.

As to the Relief granted in Equity in favour of the Parties delayed or hindered by a fraudulent Assurance.

A CREDITOR who is proceeding in equity during his debtor's lifetime to set aside a conveyance as fraudulent under the statute 13 Eliz. c. 5, must put himself in a position to complain by establishing his debt before some competent tribunal;(*d*) "for until the creditor has a certain claim upon the property of the debtor he has no concern with his frauds."(*e*)

It does not, however, appear plain from the state of the authorities whether the creditor must have an actual lien or charging order upon the property comprised in the fraudulent conveyance before he can obtain relief. The majority of cases favour the opinion that the property must be actually affected by an *elegit*, *fi. fa.*, or like process.(*f*) On the other hand, it has been decided, that after the debt is once established equity will assist the creditor by removing the fraudulent conveyance out of the way, and will then leave him to pursue his remedies against the property in the ordinary manner, either at law or in equity, as the case may be.(*g*)

(*d*) *Per* Lord THURLOW in *Colman* v. *Croker*, 1 Ves. jun. 160.

(*e*) *Per* KENT, C., in *Wiggins* v. *Armstrong*, 2 Johns. Ch. Ca. 144.

(*f*) See *Smith* v. *Hurst*, 10 Hare, 48.

(*g*) *Reese River Silver Mining Company* v. *Atwell*, L. R. 7 Eq. 347; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *Higgins* v. *York Buildings Company*, 2 Atk. 107.

And here the remarks of Lord REDESDALE on this subject to his work on Equity Pleading may be conveniently referred to.(*a*) He says: "A bill may be brought to obtain the execution or the benefit of an *elegit*, or a *fieri facias*, when defeated by a prior title, either fraudulent, or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed." "But the creditor must show that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to of an *elegit* and *fieri facias*, he must show that he has sued out the writs, the execution of which is avoided, or the defendant may demur; but it is not necessary for the plaintiff to procure returns to those writs." In *Angell* v. *Draper*,(*b*) a bill was brought by a judgment creditor for an account and discovery of goods fraudulently assigned by a debtor, in order to avoid the effect of the judgment. The defendant demurred, because the plaintiff had not alleged that he had sued out execution and taken out a *fi. fa.*, for until he had done so the goods were not bound by the judgment, nor the plaintiff entitled to an account and discovery thereof; and the demurrer was allowed.

By statute 1 & 2 Vict. c. 110, s. 13,(*c*) a judgment

(*a*) Page 126, and cited in *Re Cowbridge Railway Company*, L. R. 5 Eq. 413.

(*b*) 1 Vernon, 398; *Balch* v. *Westall*, 1 P. W. 445; *Bennett* v. *Musgrave*, 1 Ves. 51; *Collins* v. *Burton*, 4 De G. & J. 617.

(*c*) The remedies given by this section do not appear to be taken away by the Act 27 & 28 Vict. c. 112, which is presently referred to in the text. See judgment of WOOD, V.C., in *Re Cowbridge Railway Company*, L. R. 5 Eq. 413, 416; but see, how-

from the time of entering it up is made a charge in equity upon the debtor's lands, but it is enacted that no creditor shall be entitled to proceed to obtain the benefit of such charge until after the expiration of one year from the time the judgment is entered up.(*d*) Where a judgment creditor is endeavouring to obtain the benefit of this enactment, and applying for the assistance of the court to remove a fraudulent conveyance out of the way, it will be sufficient for him to state that he has proceeded to judgment, without saying that he has also taken out an *elegit*, except where the period of a year has not elapsed from the time the judgment was entered up, in which case the ordinary rule prevails, and the *elegit* must be sued out.(*e*)

By the statute 27 & 28 Vict. c. 112,(*f*) (entitled "An Act to amend the Law relating to future Judgments, Statutes, and Recognizances,") it is enacted, that no judgment, statute, or recognizance to be entered up after the passing of the Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance. In *Guest* v. *The Cowbridge Railway Company*,(*g*) it is decided that under this

ever, *contra*, *Earl of Cork* v. *Russell*, L. R. 13 Eq. 210; followed by *Hatton* v. *Haywood*, L. R. 9 Ch. 229.

(*d*) By the Irish Acts, 12 & 13 Vict. c. 95, s. 6, and 13 & 14 Vict. c. 29, s. 8, voluntary conveyances are made void against judgment creditors from the time of entering up the judgments.

(*e*) *Smith* v. *Hurst*, 10 Hare, 30.

(*f*) This Act does not extend to Ireland.

(*g*) L. R. 6 Eq. 619; and see *In re Cowbridge Railway Company*, L. R. 5 Eq. 413; *In re Duke of Newcastle, Ex parte Padwick*, 39 L. J. Ch. 69; *In re Rush*, L. R. 10 Eq. 442; *Champneys* v.

statute a judgment creditor has no charge or lien upon the land until he has got a return to his writ of *elegit* from the sheriff, though he may after putting the writ into the hands of the sheriff and before the return have a right to file a bill to remove a legal impediment ; and further, that the priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff.

Equitable interests in land are within the 1st section of the 27 & 28 Vict. c. 112. Therefore, if a judgment creditor who has sent out an *elegit* is unable to obtain delivery by the sheriff of his debtor's lands by reason of the legal estate being outstanding, he must apply to the Court of Chancery to remove the impediment, and the order of the court will be a delivery,(*a*) in execution within the statute, where land has been actually delivered in execution by writ of *elegit*, or other lawful authority, it is unnecessary to register the judgment, writ, or other process of execution, except for the purpose of obtaining under section 4 of the Act, a summary order for sale ; but before any creditor to whom any land of his debtor shall have been actually delivered in execution can obtain such summary order, his writ or other process of execution must be duly registered pursuant to section 3 of the Act.

An order for the appointment of a receiver is a " process of execution " within the meaning of the Act.(*b*)

Burland, 19 W. R. 148 ; *Earl of Cork* v. *Russell*, L. R. 13 Eq. 210 ; but see *Hatton* v. *Haywood*, L. R. 9 Ch. 229.

(*a*) See *Hatton* v. *Haywood*, L. R. 9 Ch. 229.

(*b*) *In re Pope*, 17 Q. B. D. 743 ; see also " Seton on Decrees " (5th edit.), p. 1722.

After the death of the debtor there would seem to be no necessity for the creditor to prove that he has established his claim in some action, as the Court of Chancery has full power of administering the deceased's estate, and ordering payment of the debt. It has been shown before that property comprised in a conveyance or assignment which is proved to be fraudulent within 13 Eliz. c. 5, is assets for the payment of the debts of the grantor.

It is held in the case of *Higgins* v. *The York Buildings Company*,(c) that, in granting relief to a judgment creditor against a fraudulent conveyance, equity will not decree a sale of the lands comprised in it, nor direct an account to be taken of the rents and profits which have been received by the debtor or his grantees since the filing of the bill. However, in *Blenkinsopp* v. *Blenkinsopp*,(d) where a voluntary settlement made to defeat a sequestration was set aside as fraudulent, it was held that the plaintiff was entitled to have an account of all moneys received by the trustees of the settlement since the institution of the suit.

It is a rule in equity that persons claiming under titles which are inconsistent with each other should not be made parties to the same suit.(e) And therefore, where a person, who had executed a voluntary settlement of personalty, and afterwards mortgaged the property comprised therein, brought a bill to set the

(c) 2 Atk. 107. Entries of this case in the registrar's book are set out in a note to *Blenkinsopp* v. *Blenkinsopp*, 1 De G. M. & G. 496; and see *Reese River Mining Company* v. *Atwell*, 7 L. R. Eq. 347.

(d) 1 De G. M. & G. 496.

(e) 1 Daniell's Ch. Pr. 206 (5th edit.).

settlement aside and joined the mortgagee as co-plaintiff, it was held, that neither of the plaintiffs could have any relief in that suit; not the settlor himself, for the settlement was valid against him, and not the mortgagee, for settlements of personalty are not within the statute 27 Eliz. c. 4, and, even if they had been, by associating himself in the same suit with the settlor, he would have barred himself from the relief, whatever success he might have had in a suit in which he was sole plaintiff.(*a*) But where a bill was filed by creditors to set aside a purchase on the ground of fraud, and the purchaser had since the purchase mortgaged the estate, the mortgagee was considered a necessary party, as he had the title deeds, and the court could not decide the point between the parties without inspecting them.(*b*) And a creditor, who is endeavouring to set aside a fraudulent conveyance, may, and, it would appear, ought to sue on behalf of all the creditors of the debtor; for they have a common interest in defeating an instrument which was made to hinder and delay them, and all their rights may be conveniently determined together.(*c*)

In suits also for specific performance the general rule is, that the parties to the contract are the only proper parties to the suit.(*d*) Therefore a plaintff, who would be entitled to specific performance of a contract of sale but for an incumbrance which exists

(*a*) *Bill* v. *Cureton*, 2 M. & K. 503.

(*b*) *Copis* v. *Middleton*, 2 Madd. 410; *Earl Vane* v. *Rigden*, L. R. 5 Ch. 663; 1 Daniell's Ch. Pr. 241, 5th edit.

(*c*) *Reese River Silver Mining Company* v. *Atwell*, L. R. 7 Eq. 347; see the decree in *Adames* v. *Hallett*, L. R. 6 Eq. 468; and see *Crossley* v. *Elworthy*, L. R. 12 Eq. 158, 163.

(*d*) *Tasker* v. *Small*, 3 M. & Cr. 63; see *Fenwick* v. *Bulman*, L. R. 9 Eq. 167.

upon the estate, should not pray for specific performance and for relief against the incumbrancer in the same bill, or it will be objectionable on the ground of multifariousness.(*e*)

Where, however, a bill for specific performance is filed against a voluntary settlor by a purchaser for valuable consideration there is no objection to the voluntary grantees being joined as defendants. This point is expressly decided by the case of *Townend* v. *Toker*,(*f*) where Lord Justice TURNER made the following observations on this subject: "It is, no doubt, true that in ordinary cases of suits for specific performance the vendor and purchaser are the only proper and necessary parties to the suit; but in a case of this description the settlement, if voluntary, is fraudulent and void against the purchaser, and the purchaser, who is of course entitled to the best title which the vendor can make, must, it should seem, be entitled to have the question tried whether the settlement is voluntary or not. That is a question which cannot be tried between the vendor and the persons interested under the settlement, for the settlement is binding upon the vendor. It is a question which can be tried only by the purchaser, and, if to be tried with him, I see no reason why it should not be tried in a suit for specific performance, rather than be made the subject of a distinct and separate suit, the more so, as it is a question which affects the validity no less than the performance of the contract. Such a case does not, it is to be observed,

(*e*) *Mole* v. *Smith*, Jac. 494; Daniell, Ch. Prac. vol. i., p. 203 (5th edit.).

(*f*) L. R. 1 Ch. App. 446; see *De Hoghton* v. *Money*, L. R. 2 App. 164.

stand upon the same footing as the ordinary case, in which it is doubtful whether the vendor has power to sell, and in which the court might dismiss the bill upon the ground of that doubt; for to deal with a case like the present upon that footing would go far to destroy the effect of the statute as applied to voluntary settlements, as no purchaser would take the title without being satisfied that the settlement was invalid against him; and it would, therefore, to say the least, be difficult to effect any sale of property comprised in such a settlement. There is enough, therefore, to distinguish cases of this description from the ordinary cases of specific performance; but, at all events, it appears to have been the constant practice of the court to make persons interested under settlements, alleged to be voluntary, parties to suits of this description, and I am not disposed to alter that practice."(*a*)

It is decided by the case of *De Hoghton* v. *Money*, that a purchaser for value of an interest in land cannot require a mere voluntary deed or agreement affecting the estate to be delivered up to him to be cancelled, but that the parties must be left to their legal rights and remedies.(*b*)

If a settlor himself contracts to sell property which is subject to a voluntary conveyance, the contract may be enforced against him by the purchaser,(*c*) but he cannot enforce it against an unwilling purchaser.(*d*)

(*a*) See *Daking* v. *Whimper*, 26 Beav. 568; *Willats* v. *Busby*, 5 Beav. 193.

(*b*) L. R. 1 Eq. 154; L. R. 2 Eq. 164; *Oxley* v. *Lee*, 1 Atk. 625.

(*c*) *Buckle* v. *Mitchell*, 18 Ves. 100; *Dakin* v. *Whimper*, 26 Beav. 568.

(*d*) *Smith* v. *Garland*, 2 Mer. 123; *Clark* v. *Willmott*, L. R. 7 Ex. 313.

Unless there has been part performance by the purchaser,(*e*) notice to the purchaser of the settlement is immaterial.(*f*)

The rights of creditors under 13 Eliz. c. 5 are legal rights, and mere delay by a creditor in bringing his action is no defence unless such delay has been sufficient to bar his legal right.(*g*)

The exercise of a power of appointment by a debtor in a deed by which the estate is limited to him in default of appointment by him in favour of a purchaser for value, will be restrained by injuntion at the instance of a creditor who impeaches that deed as void against him.(*h*)

As to when equity will direct an issue to try whether a conveyance was voluntary, or made for valuable consideration and *bonâ fide*, see *Empringham* v. *Short*, 3 Hare, 461 ; and *Hepworth* v. *Heslop*, 6 Hare, 622.

(*e*) *Peter* v. *Nicolls*, L. R. 11 Eq. 391.
(*f*) *Buckle* v. *Mitchell*, *supra* ; *Doe* v. *Manning*, 9 East, 59.
(*g*) *In re Maddever*, 27 Ch. D. 523.
(*h*) *Beyfus* v. *Bullock*, L. R. 7 Eq. 391.

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